

2584
No. 12261

United States
Court of Appeals
For the Ninth Circuit.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation, *2583* Appellant,
see vol. vs.
SCHENLEY DISTILLERS CORPORATION,
Appellee,
and
SCHENLEY DISTILLERS CORPORATION,
Appellant,
vs.
COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation, Appellee.

Transcript of Record
In Two Volumes
Volume II
Pages 523 to 1016

Appeals from the United States District Court for the
Southern District of California,
Central Division.

OCT 25 1949



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COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION,

Appellee,

and

SCHENLEY DISTILLERS CORPORATION,

Appellant,

vs.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation,

Appellee.

Transcript of Record

In Two Volumes

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Appeals from the United States District Court for the
Southern District of California,
Central Division.

PLAINTIFF'S EXHIBIT 60-D

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A., a Corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Mario Polastri, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 10 a.m. on November 24, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Mario Polastri, could not intelligently testify in the English language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English language, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the [501] English and the Spanish languages and that you

Plaintiff's Exhibit 60-D—(Continued)

will truly and impartially interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Mario Polastri, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Mario Polastri the reto out of the Spanish language into the English language, So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Mario Polastri, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Mario Polastri, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Mario Polastri of Corrientes 456, Buenos Aires, Argentina, broker, 46 years of age, being by me first duly [502] sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

Plaintiff's Exhibit 60-D—(Continued)

deposes and says:

Answers by Mario Polastri to
Interrogatories

To the First Interrogatory, he says:

My name is Mario Polastri; 46 years of age; residence; Corrientes 456 Buenos Aires, Argentina. Occupation: Broker.

To the Second Interrogatory, he says:

Since 1944. I am not a member of any commercial society. Always worked here like a broker without partners.

To the Third Interrogatory, he says:

I know the Plaintiff Engraw, but I do not know the defendant Schenley. I know Engraw for about two years.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio, since 1940. My associate number is 3351. The Bolsa de Comercio is a private institution between traders to collaborate and carry on business.

To the Fifth Interrogatory, he says:

Glucose in Argentina is made from corn only. I do not [503] exactly know the production. It is approximately around 35,000 tons per year.

To the Sixth Interrogatory, he says:

It varies from year to year and I do not know exactly the amount of glucose consumed in this

Plaintiff's Exhibit 60-D—(Continued)

country. My own estimation is that it is around its third of the entire production. When it is possible the export amounts to about two-third of the total production. The carry over in my opinion is about 15 to 20,000 metric tons. The balance on hand during the years 1946 and 1947 is the same as the carry over stated above. I have no further details to furnish.

To the Seventh Interrogatory, he says:

There was a very reduced market.

To the Eighth Interrogatory, he says:

I do not know the precise total. The prices between May and July 1946 were 1.20 to 1.23 pesos Argentine currency per kilo free alongside (F.A.S.). Later the market fell with no possibility of doing any business. In my opinion the prices during the period July 1946 and May 1947 went down to such an extent that in order to make a sale it was necessary to have a vendue, in which only a price of about 0.20 cents Argentine currency per kilo could be obtained. I speak like a broker who is in the situation to sell the balance. The purchasers who had selling contracts [504] with their clients could still sell for domestic consumption at 0.60 cents Argentine currency per kilo. I consider it impossible for one factory to sell to the local clients of the other factory, and more difficult for exporters to sell on the local market, as he only can export.

Plaintiff's Exhibit 60-D—(Continued)

To the Ninth Interrogatory, he says:

The prices were in May, June and July 1946, 1.20 to 1.23 Argentine currency per kilo; as to the prices for the other months, I confirm what I answered to interrogatory No. 8, where I have given the price and the market situation.

To the Tenth Interrogatory, he says:

I do not know exactly.

To the Eleventh Interrogatory, he says:

As a broker for export of general products, I cannot state the difference exactly, and I do not sell for local consumption.

To the Twelfth Interrogatory, he says:

Yes.

To the Thirteenth Interrogatory, he says:

This question is answered in the general lines of answer to interrogatory No. 8. It is well to point out at the same time that said 460 tons were weighing on this market, other quantities unsold were added to such amount because of the great decrease of international prices and the phenomenon became more important. Using my personal relationship abroad, I have cabled to Swedish, Swiss and [505] Italian firms, offering glucose without any surcharge on the prices paid by Engraw. The answers were negative, they were sorry the product did not interest them. The Italian firm added besides that UNRRA had flooded Europe with glucose and they could not consume the one in stock.

Plaintiff's Exhibit 60-D—(Continued)

These offers had been made in September and October 1946.

To the Fourteenth Interrogatory, he says:

Covered by my answer to interrogatory No. 13.

To the Fifteenth Interrogatory, he says:

The local consumer usually receives glucose in bulk. The cost of wooden containers would therefore be wasted.

To the Sixteenth Interrogatory, he says:

All Argentine glucose meets the requirements of U.S.P. (United States Pharmacopea); for such reason the chemical analysis is not necessary; nevertheless chemical analysis is done on about 80% of the amounts exported.

To the Seventeenth Interrogatory, he says:

No other glucose is produced.

To the Eighteenth Interrogatory, he says:

No.

To the Nineteenth Interrogatory, he says:

I have had no experience in such cases, because I am a broker. [506]

Answers by Mario Polastri to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) No.

(b) I have been employed during fifteen years

Plaintiff's Exhibit 60-D—(Continued)

by Italcable, beginning as a canvasser and leaving the firm as head of the commercial department, when it suspended services on account of the war. Immediately afterwards I opened my office as an independent broker, taking advantage of my previous experience in Europe.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) In my capacity as a broker I have made transactions with all the firms mentioned. I have never been an employee or agent of any of them.

(b) I know Mr. Fred Berger in Engraw. (I met him on the occasion of these transactions, which are the object of the present suit). In Sociedad Industrial Financiera Argentina (SIFAR) I have known Mr. Luis Ditisheim for the past three years. In Eugenio Lang I know all the executives and the staff since they arrived in the country. I have known Mr. Ricardo Gonzalez for about 20 years. My relationship with all of them was only commercial.

(c) Covered by my answer to point (b). [507]

(d) Covered by my answer to point (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says:

(a) It is a private institution, whose members, under certain rules, sponsored by said institution, perform transactions in purchase and sale of products.

Plaintiff's Exhibit 60-D—(Continued)

(b) There is only one Bolsa de Comercio in Buenos Aires, handling all kinds of products, and there exist some other Bolsas, each specialized in different products, but there is no specialized Bolsa for glucose.

(c) Privately owned.

(d) Not competitive.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) There is no glucose manufactured from sugar cane or beets in Argentina.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) No production from sugar cane. In my opinion the amount of glucose of maize consumed, is about 15,000 tons per annum. The amount exported is about 10 to 15,000 tons during the same period. The carry over from 1945 is perhaps 5,000 tons. The balance on hand is about 10,000 tons.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) I am not in a position to answer exactly because such statistics are not published in Argentina.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) No. I am working only as a broker.

(b) Idem.

(c) Idem.

Plaintiff's Exhibit 60-D—(Continued)

(d) *Idem.*

Answers by Mario Polastri to Second
Interrogatories Numbers One to Seven

To the First Interrogatory, he says:

Name: Mario Polastri, 46 years of age, Residence: Corrientes 456, Occupation: Broker.

To the Second Interrogatory, he says:

Since 1944. I am not a member of a commercial society. Always worked here like a broker without partners. The aggregate amount of my operations per annum is about ten million pesos Argentine currency.

To the Third Interrogatory, he says:

I know the Plaintiff Engraw, but I do not know the defendant Schenley. I know Engraw for about two years.

To the Fourth Interrogatory, he says: [509]

As a member of the Bolsa de Comercio I can perform my operations as a broker, and the government does not require any special license, but only the payment of taxes.

To the Fifth Interrogatory, he says:

Such data do not pertain to my operations.

To the Sixth Interrogatory, he says:

Covered by my answer to interrogatory No. 5.

To the Seventh Interrogatory, he says:

Covered by my answer to interrogatory No. 5.

Plaintiff's Exhibit 60-D—(Continued)

Answers by Mario Polastri to Second
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) I have been during fifteen years employed by Italcable, beginning as a canvasser and leaving the firm as head of the commercial department, when it suspended the services on account of the war. Immediately afterwards I opened my office as an independent broker, taking advantage of my previous experience in Europe.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) In my capacity as a broker I have made transactions with all the firms mentioned. I have never been employee or agent of any of them.

(b) I know Mr. Fred Berger in Engraw. (I met him on the [510] occasion of these transactions which are the object of the present suit). In Sociedad Industrial Financiera Argentina (SIFAR) I have known Mr. Luis Ditisheim for the past three years. In Eugenio Lang I know all the executives and the staff since they arrived in the country. I have known Mr. Richardo Gonzalez for about twenty years. My relationship with all of them was only commercial.

(c) Covered with my answer to (b).

(d) Covered with my answer to (b).

Plaintiff's Exhibit 60-D—(Continued)

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) Such data do not pertain to my operations.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) Such data do not pertain to my operations.

(b) Covered with my answer to (a).

(c) Covered with my answer to (a). [511]

PLAINTIFF'S EXHIBIT 60-E

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Juan K. Lang, taken before me,
Jones R. Trowbridge, Consul of the United States
of America at Buenos Aires, Argentina, at 4:00
p.m. on November 20, 1947, under authority and by

(Plaintiff's Exhibit 60-E—(Continued)

virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Juan K. Lang, did well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories and cross-interrogatories were put to him in the English language. The answers of the witness, Juan K. Lang, to said interrogatories and cross-interrogatories were taken down stenographically by Carlota S. de Lange, of Vidal 1940, [512] Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Juan K. Lang, a witness now to be examined. So help you God.”

Juan K. Lang of 615 Avda. R. Saenz Pena, manager and partner of Eugenio Lang S.R.L., of Avda. R. Saenz Pena 615, Buenos Aires, Argentina, 37 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

(Plaintiff's Exhibit 60-E—(Continued))

Answers by Juan K. Lang to
Interrogatories

To the First Interrogatory, he says:

Juan K. Lang, 37 years of age, residence Buenos Aires, 615 Avda. R. Saenz Pena, occupation exporter.

To the Second Interrogatory, he says:

I am manager and partner of Eugenio Lang S.R.L. for 10 years. Our firm exports Argentine commodities and foodstuffs to the extent of 10 to 25,000 pesos annually.

To the Third Interrogatory, he says:

I know Plaintiff since May 1946 and the defendant by [513] name.

To the Fourth Interrogatory, he says:

I am since several years member of the Bolsa de Comercio which at the same time is a commodity exchange and a stock exchange. My firm operates to the extent of 3 to 5,000.000 pesos annually on this exchange.

To the Fifth Interrogatory, he says:

Glucose is manufactured in Argentina from corn (maize). I estimate the annual production between 28,000 and 31,000 tons.

To the Sixth Interrogatory, he says:

I don't know the amount of glucose consumption in Argentina nor do I know the carry-over and the balance on hand during the years of 1946 and

(Plaintiff's Exhibit 60-E—(Continued))

1947 as no official statistics are published to this effect. My best estimate would be that local consumption is about 18 to 19.000 tons, that the carry-over at the end of 1946 was about 3 to 5.000 tons. The export during 1946 was 8.014 metric tons.

To the Seventh Interrogatory, he says:

There was a market for glucose crystal clear testing between 43° and 45° Baume made from pure corn in Buenos Aires up to May 1, 1947. However since the beginning of the second half of 1946, this market was swamped with offers whilst no buyers appeared.

To the Eighth Interrogatory, he says: [514]

Glucose was bought and sold during the first half of 1946 at prices ranging from 1.15 to 1.22 pesos per kg packed for export; at the beginning of the second half of 1946 the market collapsed and virtually no transactions were made for a rather long period. Only some minor transactions were made during the last months of 1946 and the first three months of 1947 at prices ranging between 55 and 60 centavos per kg. The market however continued to go down and between April 1947 and November 1947 glucose has been sold between 43 and 55 centavos per kg.

To the Ninth Interrogatory, he says:

May and June 1946: pesos 1.15 to 1.22 per kg; July, August, September practically no operations; October, November, December: 60 to 62 centavos;

(Plaintiff's Exhibit 60-E—(Continued))

January, February, March 1947: 55 to 60 centavos; April 1947: 50 to 53 centavos. The reason for the sudden collapse of the market was the non-shipment of glucose to the export markets and as a consequence the accumulation of stocks in Buenos Aires.

To the Tenth Interrogatory, he says:

There is no difference except expenses for export expenses for export packing and expenses connected with export.

To the Eleventh Interrogatory, he says:

There is a difference of about 15 centavos per kg. These 15 centavos are composed as follows: 10 centavos cost of container, 2 centavos export tax and cost of export license, [515] 2 centavos stevedoring and expenses of custom broker, 1% banking expenses.

To the Twelfth Interrogatory, he says:

Yes. All glucose was made from pure corn.

To the Thirteenth Interrogatory, he says:

It would have had a disastrous effect. No glucose has ever been sold in public auction in Buenos Aires and the sale of such a heavy quantity cannot be made in public auction; the local consumers are used to purchase very small quantities (3 to 5 tons weekly or biweekly), they cannot and would not buy or store any larger quantity and would not even attend a public auction for such heavy quantities.

To the Fourteenth Interrogatory, he says:

(Plaintiff's Exhibit 60-E—(Continued))

It is simply inconceivable that quantities as mentioned can be sold in public auction in Buenos Aires. In my opinion in a public auction of such quantities the prices would have dropped to 20 or 25 cenatvos if buyers would have appeared at all.

To the Fifteenth Interrogatory, he says:

Yes. It would have had an adverse influence. Local consumers are generally used to bulk glucose and merchandise packed in wooden barrels means additional labour expenses and the necessary storage space.

To the Sixteenth Interrogatory, he says:

Yes. In most of the sales such an analysis is furnished [516] by the seller. Very often however such an analysis is not required by the buyer as there are only two glucose manufacturers in Argentina who both elaborate a standard product corresponding to the U. S. Pharmacopea.

To the Seventeenth Interrogatory, he says:

No, as no other glucose is manufactured over here.

To the Eighteenth Interrogatory, he says:

We exported between the 1st day of May 1946 and the 1st day of May 1947 approximately 1475 tons of glucose. We obtained the export license from the Secretaria de Industria y Comercio, Direccion de Importacion y Exportacion, paying the corresponding fee of $1\frac{1}{2}\%$ sales tax and expenses for stevedoring, custom house brokers and bank expenses.

(Plaintiff's Exhibit 60-E—(Continued))

To the Nineteenth Interrogatory, he says:

Yes. If contracts are made under the rules of the Bolsa de Comercio, it is a practice to ask for the arbitration under the rules of this Bolsa. Until the decision of the arbiters has been announced to the parties, the merchandise cannot be disposed of. If a contract has been made not under the rules of the Bolsa de Comercio, law suit has to be filed with the ordinary Civil Court; the same in this case the merchandise cannot be disposed of unless a specific order to this effect has been given by the competent judge. [517]

Answers by Juan K. Lang to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) My firm has never been a manufacturer of glucose; my firm is an exporter of glucose.

(b) I am since ten years manager and partner of Eugenio Lang S.R.L.; before that I was six years manager and partner of Eugenio Lang, and before that I was five years employed by several export firms.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) Yes.

(b) I am since ten years partner of Eugenio Lang S.R.L. I know since five years Sociedad Industrial Financiera Argentina SIFAR S. A., since

(Plaintiff's Exhibit 60-E—(Continued)

nine years R. H. Gonzalez y Cia. and since two years Plaintiff.

(c) Yes.

(d) I know on a purely commercial basis, Mr. Ditisheim and M. Dautz of Sociedad Industrial Financiera Argentina SIFAR S. A.; Mr. Ricardo Gonzalez of R. H. Gonzalez y Cia., Mr. Berger of the Plaintiff, and all the other partners of my own Company and I know these gentlemen since the time mentioned in point (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says: [518]

(a) A place where businessmen come together in order to buy and sell commodities.

(b) There are two exchanges in Buenos Aires, a small one dealing exclusively in spot lots of cereals, the Bolsa de Cereales, and a much larger one dealing in all commodities and stocks called Bolsa de Comercio de Buenos Aires.

(c) Both are privately owned.

(d) They are not competitive as one deals only in spot lots of cereals.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) No glucose is manufactured from sugar cane and beets.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) No glucose is manufactured in Argentina

(Plaintiff's Exhibit 60-E—(Continued))

from sugar cane. The export of glucose made from corn was during 1946, 8.014 tons. I don't know exactly the domestic consumption, carry-over and balance of corn glucose during the years 1946 and 1947. I estimate however that the local consumption was about 18 to 19.000 tons and the carry-over at the end of 1946 about 3 to 5.000 tons.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) No prices are published at the Bolsa de Cereales for Argentina corn glucose. In my own opinion the prices were in [519] May 1946, 1.15 to 1.22 for asked and 1.13 to 1.20 for bid; in the month of June 1946 prices applied without any change. July, August, September 1946, no sales, no operations, no prices. October 1946, 61 to 62 centavos; November 1946, 61 centavos; December 1946, 60 to 61 centavos; January 1947, 58 to 60 centavos; February 1947, 56 to 58 centavos; March 1947, 55 to 56 centavos; April 1947, 52 to 53 centavos. I want to add that from July till September 1946 no sales at all were made so that no bid was available at any price; only beginning from October 1946 some minor transactions were made at prices about 61 to 62 centavos. However the prices indicated from October 1946 to April 1947 are also only asked prices with no bid as operations were extremely reduced and no buying interest existed.

(Plaintiff's Exhibit 60-E—(Continued))

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) Yes.

(b) Yes.

(c) We made the following export shipments all for pure corn glucose testing from 43° to 45° Baume packed in wooden barrels: in May 1946, 62,680 kg to the U.S.A.; 128,401 kg. to Switzerland; 24,784 kg to Palestine—in June 1946, 54,776 kg to the U.S.A.; 74,866 kg to Switzerland; 46,390 kg to Palestine—in July 1946, nothing—in August 1946, 104,310 kg to the U.S.A.; 59,699 kg to Switzerland—in September [520] 1946, 97,822 kg to the U.S.A.; 6,150 kg to Switzerland; 47,849 kg to Palestine—in October 1946, 84,804 kg to the U.S.A.—in November, 1946, 178,675 kg to the U.S.A.—in December 1946, 15,341 kg to the Philippines—in January 1947, 99,478 kg to Italy—in February 1947, 9,598 kg to Palestine; 2,904 kg to the Philippines; 50,066 kg to Italy—in March 1947, 84,526 kg to Switzerland; 19,325 kg to Palestine; 64,930 kg to Italy; 98,381 kg to India—in April 1947, 49,865 kg to Switzerland; 9,901 kg to Palestine. The rules of my firm do not allow me to indicate at what prices and to whom we have sold the quantities mentioned above.

(d) As exports of corn glucose can only be made with an export license, we had for each delivery such an export license in our hands. The licenses are issued by the Secretaria de Industria y Co-

(Plaintiff's Exhibit 60-E—(Continued))

mercio, Direccion de Importacion y Exportacion, and as they have to be returned afterwards we cannot indicate the numbers and dates of these licenses.

In answer to the first part of the question, I would like to say that we have delivered and shipped all our sales of glucose at the dates mentioned above. [521]

PLAINTIFF'S EXHIBIT 60-F

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a Corporation

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Angel Gabriel, taken before me, Jones R. Trowbridge, Consul of the United States of America, at Buenos Aires, Argentina, at 14:30 p.m. on November 24, 1947, under authority and by virtue of a commission issued out of the District

Plaintiff's Exhibit 60-F—(Continued)

Court of the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Angel Gabriel, could not intelligently testify in the English language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the English and the Spanish languages and that you will truly [522] and imparitally interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Angel Gabriel, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Angel Gabriel thereto out of the Spanish language into the English language. So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Angel Gabriel, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Angel Gabriel, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being

Plaintiff's Exhibit 60-F—(Continued)

then read over correctly to the said witness by me was then signed by the said witness in my presence.

Angel Gabriel, of 25 de Mayo 67, Buenos Aires, Argentina, stevedore, 32 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the [523] truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Angel Gabriel to
Interrogatories

To the First Interrogatory, he says:

My name is Angel Gabriel; 32 years of age. Residence: 25 de Mayo 67, Buenos Aires, Argentina. Occupation: I have a firm for loading and unloading steamers. I am associated with my father, Blas Gabriel in this business.

To the Second Interrogatory, he says:

I have been a member of the firm of Gabriel & Cia., located in Buenos Aires, for the last nine years. The firm handles part of the cargo of approximately (1500-1800) (M. Gabriel) different (JRT) steamers per year.

To the Third Interrogatory, he says:

I do not know either the plaintiff nor the defendant, but I do know by name the plaintiff.

Plaintiff's Exhibit 60-F—(Continued)

To the Fourth Interrogatory, he says:

There is no government authorization required for this business; I only registered as a trader in the Registro Publico de Comercio of Buenos Aires.

To the Fifth Interrogatory, he says:

I do not know all the expenses; I can only answer partially. [524] I know that in transfer from F.A.S. to F.O.B. a sales tax of $11\frac{1}{4}\%$ over the selling price of the merchandise has to be paid. A tax of 5 0/00 for getting the export permit has also to be paid. (For each thousand pesos Argentine currency of merchandise, it is necessary to pay 5.00 pesos Argentine currency for the export permit). My stevedoring charges are 0.70 cents Argentine currency per barrel; nightwork and holidays have 50% surcharge.

To the Sixth Interrogatory, he says:

I only know as much as I said in my answer to interrogatory No. 5. We only charge this merchandise by barrel and not by ton. We consider each barrel containing from 300 to 320 kilos. As far as I know my competitors charge more or less the same prices.

To the Seventh Interrogatory, he says:

About this point I have no knowledge, except what I stated about stevedoring charges.

Answers by Angel Gabriel to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

Plaintiff's Exhibit 60-F—(Continued)

(a) I have always worked on the same line, that is loading and unloading of merchandise from and to steamers.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says: [525]

(a) I only know as clients of our firm Sociedad Industrial Financiera Argentina (SIFAR) and Eugenio Lang.

(b) I have known the directors in Eugenio Lang for eight years. As to Sociedad Industrial Financiera Argentina (SIFAR) although clients of ours, I do not know any particular person.

(c) I have answered this interrogatory under (b).

(d) In Eugenio Lang I have known Messrs. Eugenio Lang and Juan Lang for eight years.

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) The source of my knowledge is the experience I have had in conducting my business.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) The costs, taxes and expenses which I mentioned in answer to interrogatory No. 6 do not change according to the size of shipment.

(b) In answer to this question I can only repeat what I have mentioned in my answer to direct interrogatory No. 5 and No. 6.

(c) I have no knowledge as to costs and taxes. As to our concern there has been an increase from

Plaintiff's Exhibit 60-F—(Continued)

0.70 cents Argentine currency to 0.85 cents Argentine currency per barrel, in February 1947. [526]

/s/ CLARA ROBINE

Interpreter

/s/ A. GABRIEL

ANGEL GABRIEL

Witness

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America

PLAINTIFF'S EXHIBIT 60-G

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND CROSS-INTERROGATORIES

Deposition of Ladislao Lakatos, taken before me,
Jones R. Trowbridge, consul of the United States
of America, at Buenos Aires, Argentina, at 10:15
a.m. on November 25, 1947, under authority and

Plaintiff's Exhibit 60-G—(Continued)

by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Ladislao Lakatos, did well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories and cross-interrogatories were put to him in the English language.

The answers of the witness, Ladislao Lakatos, to said [528] interrogatories and cross-interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Ladislao Lakatos, a witness now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Ladislao Lakatos of 25 de Mayo 267, Buenos Aires, Argentina, broker, 59 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-

Plaintiff's Exhibit 60-G—(Continued)
interrogatories now to be put to you. So help you
God."

deposes and says:

Answers by Ladislao Lakatos to
Interrogatories

To the First Interrogatory, he says:

My name is Ladislao Lakatos, 59 years of age.
Residence: 25 de Mayo 267. Occupation: Broker.

To the Second Interrogatory, he says: [529]

I have been broker in the City of Buenos Aires
for the last 32 years. The same residence in Buenos
Aires. I have been associated with Mr. Pablo Pels
in the firm of Pels & Lakatos from 1916 to 1926;
from 1926 to date under my own name and signa-
ture of L. Lakatos. The amount of money earned
in my firm is about 25,000 to 100,000 pesos Argen-
tine currency a year. I have moved between 20,000
to 100,000 tons of produce a year.

To the Third Interrogatory, he says:

I do not know either of them other than by name.

To the Fourth Interrogatory, he says:

There are no licenses or authorizations necessary
for the general business in Argentina, but I am in-
scribed in the Comision Nacional de Granos y Ele-
vadores, which governs the grain and seed trade of
the Argentina, under No. 812. I am a member of
the Bolsa de Comercio and I am a member of the
Bolsa de Cereales; I am also a member of the
Grain Trade Chamber of Buenos Aires.

Plaintiff's Exhibit 60-G—(Continued)

To the Fifth Interrogatory, he says:

I do.

To the Sixth Interrogatory, he says:

1½% for export permit, 1¼% for sales tax 3 o/oo statistical tax. ½% brokerage. About 1% banking expenses and 0.80 cents Argentine currency a cask for the material being put on board. They calculate normally 5% [530] between F.A.S. and F.O.B.

To the Seventh Interrogatory, he says:

The cost of cooperage was about 30.00 pesos Argentine currency each, or say about 100.00 pesos Argentine currency a ton, one year and a half ago. The cost of delivery from Buenos Aires market to free at shipside would be 7.00 pesos Argentine currency the ton. From Buenos Aires harbor to F.O.B. Buenos Aires harbor would be those 5% which I mentioned in the previous question.

Answers by Ladislao Lakatos to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) Before I went to partnership with Mr. Pels, I was employed from 1910 to 1916 with Messrs. Bunge & Born, and Molinos Rio de la Plata, Argentina. My last job having been manager of Molino Nogoya (flour mill): Before that I had been employed by Messrs. Bunge & Born for five years in Europe.

Plaintiff's Exhibit 60-G—(Continued)

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) I did. I did business as a broker with Sociedad Industrial Financiera Argentina (SIFAR) and with Messrs. Eugenio Lang.

(b) I know in Sociedad Industrial Financiera Argentina [531] (SIFAR) Mr. Tillman, one of the directors, and Mr. Dittisheim, one of the managers, Mr. Herten, another of the directors, for quite a number of years. Mr. Juan Lang of Eugenio Lang I also know personally, more or less since they arrived in Argentina ten or twelve years ago.

(c) Yes. Stated in answer to interrogatory (b).

(d) With the persons mentioned above I am having telephone conversations on business several times a week, but I do not see them personally sometimes for months. My relationship is purely commercial.

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) My source of information is experience as a broker of 30 years.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) Between 50 tons and 275 tons the cost would be always proportional and would not be augmented or diminished in any appreciable amount.

(b) See my answer to interrogatory No. 6; exact and itemized reply.

Plaintiff's Exhibit 60-G—(Continued)

(c) Taken on a percentage basis since costs and taxes have not varied in the period of May 1, 1946 to May 1, 1947. The only thing which has been augmented is the cost of stevedoring on board, which must have risen from 0.70 to [532] 0.80 cents Argentine currency each cask to 1.00 peso to 1.20 Argentine currency each. On the other side, as prices of liquid glucose have fallen violently in said period, the absolute cost of this operation has been reduced by about 50%. I might add that prices of glucose previous to May 1946 have been over 1.00 peso Argentine currency per kilo, and by end of the year they have fallen to less than 0.50 cents Argentine currency per kilo. Concerning the Argentine market for glucose during the year May 1, 1946 to May 1, 1947, I attach hereto a statement marked Exhibit "A".

/s/ L. LAKATOS

LADISLAO LAKATOS

Witness

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America

This Exhibit, in three pages, marked "A" was produced by Witness Ladislao Lakatos, in connection with his answer to Cross-Interrogatory No. 4 (to Plaintiff's interrogatory No. 5), and by him

Plaintiff's Exhibit 60-G—(Continued)

deposed unto and subscribed by him at the time of his examination before the undersigned,

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America.

November 25th 1947

The elaboration of corn syrup—liquid glucose 43/45° [533] Be—was for quite a time a monopoly of a northamerican concern, local branch of the Corn Products refining Company of U.S.A., who sold their entire output, locally. Nobody thought about export.

About the same time that this company has been put on the United States Proclaimed List of Certain Blocked Nationals, during the last war—as I recollect early in 1943—a new factory started to produce, in Rio 2.o, Province of Cordoba, owned by the well known northern industrialists, Messrs. Pezza; under the then prevailing circumstances, their start resulted extraordinarily favourable, because about the same time inquiries began to appear also for export, absorbing all they could produce. By this time, the production of both existing factories amounted to about a hundred tons a day.

The blacklisted factory still sold its production to local consumers, and according to their sales policy, which they still follow, kept the prices low. The other factory, even if interested up to a certain point in assuring for itself part of the local busi-

Plaintiff's Exhibit 60-G—(Continued)

ness, was from the start selling most of their output to export.

Corn was a glut on the local market up to the end of war in Europe; cornsyrup prices kept on accordingly at about 300 pesos a ton, including wooden casks, nett weight.

As recently as April 1945, I did business at 350 pesos a [534] ton, delivered f.a.s. steamer in the Port of Buenos Aires.

The later evolution of prices, according to my records, was as follows:

| | |
|--------------|------------------------|
| May 1945 | Pesos 375.—per 0/00 kg |
| June | 500.— |
| July | 600.— |
| August | 630.— |
| September | 650.— |
| October | 750.— |
| January 1946 | 780.— |
| February | 800.— |
| March | 1000.— |
| April | 1050.— |
| May | 1200.— |

after which date, prices remained stationary, without business, as the trade was waiting for regulation of exports by the new, Peron, government, dedicated at that moment to a campaign for reduction of the cost of subsistence, and there were no new export permits forthcoming, although permits for sales up to the end of May have been conceded

Plaintiff's Exhibit 60-G—(Continued)

and these were exported accordingly.

This situation was resolved by September 1946; but by that time, the international market for cornsyrup became weaker, competitors from U.S.A. started offering at prices lower than argentine producers were asking; the more so, as [535] in April/May 1946 on account of some extraordinary purchases by an outsider, the market went to unusual heights and speculators purchased all available quantities to be produced up to March 1947 at the then prevailing prices, vis: Pesos 1200.—a ton.

In the meantime, Refinerias de Maiz raised their prices for local consumption (in iron containers to be returned) not higher than 650 Pesos a ton and their selling price today is at about 450 Pesos a ton. Today, prices for export and local consumption are at parity again; especially so on account of old stocks which are glutting the market and are not taken for export any more, as they became yellow and milky in colour, which the export market does not fancy; everybody is asking for crystal clear.

This business, on account of its relative unimportance in concentrated in very few hands; I might say that apart from the two producers, not more than half a dozen jobbers, four or five brokers and not more than twenty exports have been dealing in cornsyrup; the intervention of the local commodity exchanges (there are two of them in Buenos

Plaintiff's Exhibit 60-G—(Continued)

Aires, one each in Rosario, Santa Fe, Bahia Blanca and Parana) has been reduced to the registering of contracts, obligatory according to the actual stamp-tax law.

Most of the contracts have been subject to arbitration clauses by the Bolsa de Coercio de Buenos Aires (Buenos [536] Aires Trade Exchange) which is the most important of them; on its premises all kind of general business is transacted, while the others deal only in grain and oilseeds. I understand that non fulfillment of contracts of cornsyrup has produced quite a chain of demands, as several contracts have changed hands on rising prices. Some of the jobbers have suffered very heavy losses, as their contracts have not been taken up when prices started to fall.

/s/ L. LAKATOS [537]

Mr. Rowe: I think that is right.

The Court: I will order these transcribed into the record and I will read them before we conclude the case and possibly before tonight.

Mr. E. B. Stanton: That is the plaintiff's case, your Honor.

The Court: We will take a short recess, then, gentlemen.

(Short recess.)

The Court: Go ahead, gentlemen.

Mr. L. B. Stanton: One matter, your Honor, that the clerk brings my attention to, and that is the fact we had——

The Court: I did not hear you.

Mr. L. B. Stanton: One matter that the clerk calls to my attention, and that is there was a notice for a preliminary trial which was set over until the date of trial.

The Court: Pre-trial?

Mr. L. B. Stanton: No. That referred to the averment in Paragraph I of the answer to the two causes of action. I think that relates to the fact that the plaintiff did not file their articles of incorporation or domesticate, therefore, they were barred.

The Court: Yes. Well, that is a question of law. All of these questions are questions of law which we can [538] consider at the conclusion of the testimony.

Mr. L. B. Stanton: I just thought I would call the court's attention to it at this time.

The Court: I think we will drop it and say the motion will be denied without prejudice to raising the same point on the argument. That clears your record. Is that all right?

Mr. Bronson: It is quite all right with us, your Honor.

The Court: All right, gentlemen, that brings us up to date.

Mr. Bronson: I understand that the plaintiff has rested its case.

The Court: The plaintiff has rested, yes.

DEFENDANT'S CASE IN CHIEF

Mr. Bronson: In the defense, if your Honor please, first, we offer into evidence the deposition of Ralph Heymsfeld, some of the exhibits to which and some excerpts from the body of which have already been placed in evidence.

The Court: That is all right.

Mr. Bronson: I offer the deposition in evidence.

Mr. L. B. Stanton: We offered part of it.

The Court: All right.

Mr. Bronson: Now, Judge, I don't know what method you [539] adopt in this case. They have excerpted certain portions. Now I am offering the entire amount.

The Court: That is all right; you can offer the entire amount of the remainder and they can indicate to me any portion they object to.

Mr. Bronson: Yes.

The Court: Now I will receive that as your exhibit.

Mr. Bronson: That is right.

The Court: Excepting the portions which they have already read into the record.

Mr. Bronson: That is right.

The Court: How about the exhibits, however?

Mr. Bronson: All exhibits are in the first volume. We are offering that also.

The Court: Then we can take the exhibits in the volume as one exhibit.

Mr. Bronson: That is right.

The Court: Whatever is left.

Mr. Bronson: That is right.

The Court: Those that have not been received.

Mr. Bronson: That is the effect of our offer.

The Clerk: Your Honor, it is my understanding that there are two depositions of that gentleman, one dated October 22, 1947 and the other, October 30, 1947.

Mr. Bronson: That is correct. [540]

The Clerk: And there are two groups of exhibits. I believe one came in with each deposition. Which is being offered?

The Court: Both.

Mr. Bronson: Both.

The Court: Give them different numbers, then, as to the dates. You arrange them according to dates.

The Clerk: Defendant's Exhibit R in evidence is the deposition dated October 22, 1947, filed January 6th, 1948.

Mr. L. B. Stanton: In order not to encumber the record, your Honor, I presume the exhibits in that deposition which are already in evidence will not be renewed in there?

The Court: That is right. The exhibits which have not been offered are received together as one exhibit. We won't take the trouble to mark them alphabetically.

Mr. L. B. Stanton: What I am getting at, there are a number of exhibits from there that have already been offered in evidence.

The Court: I understand that.

Mr. L. B. Stanton: The exhibits will not be again admitted.

The Court: No, no. They are excluded because they already have a number.

The Clerk: The exhibits to this deposition dated October 8, 1947, [541] are marked Defendant's Exhibit R-1.

Mr. Bronson: Did you give the right date for that, October 8th?

The Clerk: It is so indicated on the cover.

Mr. Bronson: All right. All right; I am satisfied with that.

The Clerk: It appears that this is the date the exhibits were put into this folder.

Mr. Bronson: All right.

The Clerk: It also bears the file date of January 6, 1948.

Mr. Welbourn: You stated the deposition was dated October 22nd.

The Court: Give the file date.

The Clerk: Both of them were filed January 6th.

The Court: Filed the same date?

The Clerk: Yes. The deposition taken October 30, 1947 is marked Defendant's Exhibit R-2 in evidence; and the volume of exhibits accompanying this deposition is marked Defendant's Exhibit R-3 in evidence.

(Defendant's Exhibits R and R-1 read in words and figures as follows:)

(Defendant's Exhibit R-2 set out on pages 775 to 810 and Defendant's Exhibit R-3 set out on pages 811 to 876.)

DEFENDANT'S EXHIBIT R

In the District Court of the United States for the
Southern District of California

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

Deposition of Ralph T. Heymsfeld, called in be-
half of the Plaintiff, pursuant to notice, under Rule
30, taken before James B. Kilsheimer, Jr., a Notary
Public, at his office, Number 10 East 40th Street,
City, County and State of New York, on Wednes-
day, October 22, 1947, commencing at 10:30 o'clock
in the forenoon.

Appearances:

STANTON & STANTON, ESQS.,

Attorneys for the Plaintiff,

By HARRY S. MESIROV, ESQ.,
of Counsel.

BRONSON, BRONSON & McKINNON,
ESQS.,

Attorneys for the Defendant,

By CHARLES PICKETT, ESQ.,

For CHADBOURNE, WALLACE,

PARKE & WHITESIDE, ESQS.,
of Counsel.

It Is Stipulated By and Between the Plaintiff

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

and Defendant, by their counsel here appearing, that the original deposition of the witness being examined may remain in the hands of James B. Kilsheimer, Jr., Esq., Notary Public, at his office at 10 East 40th Street, New York City, for review and signature by the witness and for the completion of the notarial certificates, and if the deposition, together with such corrections as the witness may desire to make, is not signed by the time of trial, it may be used by either side with the same force and effect as though it had been signed and all formalities complied with.

It Is Further Stipulated that in case the witness refuses to answer a question, it shall not be necessary for the Notary Public to repeat that question and to obtain the witness' refusal to answer.

It Is Further Stipulated that the deposition of this witness is being taken under the same notice and proof of service which was incorporated in the depositions taken on Wednesday, October 8, 1947, the adjournment of the examination of this witness to this time being by stipulation of counsel, duly entered in the District Court of the United States for the Southern District of New York. [544]

RALPH T. HEYMSFELD

called as a witness, being first duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Mesirov:

Q. Mr. Heymsfeld, what is your occupation?

EXHIBIT R—(Continued)

(Testimony of Ralph T. Heymsfeld.)

A. I am an attorney.

Q. Do you hold any position with Schenley Distillers Corporation, the defendant in this case?

A. Yes. I am general counsel of the corporation. I am also secretary. And I am a director of the corporation.

Q. And I suppose you are devoting your entire time to your duties with the corporation?

A. That is correct, sir.

Q. If satisfactory to you and your counsel, for purposes of brevity, we will refer to the plaintiff as "Engraw" and to the defendant as "Schenley" instead of using their respective corporate titles in full.

Mr. Pickett: That is quite all right, Mr. Mesirov.

Q. (By Mr. Heymsfeld): I understand that Schenley is a parent corporation having a number of subsidiaries? A. That is correct.

Q. Will you state the names and the location of those subsidiaries?

A. It is a long list, which I don't have in mind.

Mr. Pickett: Do you want all the subsidiaries? They [545] are very voluminous.

Mr. Mesirov: Well, it would be just as easy to give them all.

(Discussion off the record.)

Q. You will furnish such a list to me?

A. That is correct, sir.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Testimony of Ralph T. Heymsfeld.)

Q. Are you likewise general counsel, secretary and director of the subsidiaries?

A. I am not a director of any of the subsidiaries. I am general counsel of all of the American subsidiaries and I am secretary of most of the corporations, but not of all.

Q. You might, for convenience, in supplying the list of subsidiaries, also state the office which you hold in each.

A. I will do that.

Q. You have just made a distinction between American and other subsidiaries. Have you any subsidiaries in South America?

A. No.

Q. The District Court of the United States for the Southern District of California, Central Division, has issued an order against Schenley for the production of the following documents:

1. All telephone calls relating to this [546] transaction between Schenley and Whipple and as between the San Francisco offices of Schenley and their Cincinnati offices. I might say here that the transaction referred to is the present suit of Engraw against Schenley.

2. All reports made by the San Francisco offices to the Eastern offices, letters, correspondence, telegrams or inter-office communications between Donnelly and their executive offices.

3. Written instructions to Woolsey from any executive office and record of all telephone calls between Woolsey and any executive office.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

4. All correspondence between the San Francisco offices and the Eastern offices relative to the May 23rd letter or as to negotiations concerning the glucose contract.

5. Written report by Donnelly and Baglin concerning the glucose transaction, to the executive offices or attorneys, in preparation for this.

I have agreed with your counsel that you may produce at this time the originals or photostatic copies of those documents and that their production here, for purposes of examination and copying, will be in satisfaction of the order made by the Court to produce them in California.

Do you have those documents with you?

A. Yes. They are in the possession of counsel.

Q. Will you produce them? [547]

Mr. Pickett: We will produce what we have here.

(Discussion off the record.)

Mr. Pickett: I have here what I am informed are notes of a telephone conference between Mr. Donnelly, of the San Francisco office, and Mr. Whipple. That you can have, sir. I may say that I am advised that those are notes of a conversation held on the 14th day of May, 1946.

Mr. Mesirov: Mark it for identification.

(Notes of telephone conference of May 14, 1946 between Mr. Donnelly and Mr. Whipple)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

marked Plaintiff's Exhibit 7-N for Identification.)

Mr. Pickett: And there is also here a document, which I will hand you in a moment, Mr. Mesirov, showing an entry on a telephone scratch pad for the 15th day of May, 1946, which relates to 7-N for Identification, and this document also contains a similar telephone scratch pad entry for the 3rd day of June, 1946.)

(Discussion off the record.)

Mr. Pickett: I don't know whether the telephone conference referred to on the left hand side of that was held on the 3rd of June, the 2nd of June or the 4th of June.

Mr. Mesirov: Mark it for identification.

(Telephone scratch pad entries above referred to marked Plaintiff's Exhibit 8-N for Identification.)

Mr. Pickett: Next, I have, Mr. Mesirov, a document [548] which is a bill of the Pacific Telephone and Telegraph Company dated June 6, 1946, addressed to Schenley Distilleries, Inc., consisting of four pieces of paper. This lists all of the long distance telephone calls, I am informed, during the period mentioned by the bill, and I am advised that any long distance telephone calls which Mr. Donnelly would have made during that period will be reflected on this bill.

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Bill of Pacific Telephone and Telegraph Company to Schenley, June 6, 1946, marked Plaintiff's Exhibit 9-N for Identification.)

Mr. Pickett: Next, Mr. Mesirov, I have three documents, clipped together, headed "Copy of vendor's bill," the vendor being stated as Pacific Tel & Tel. The date is June 11, 1946. These three documents cover the period from May 20th to some time in July, I think the latest date is the 2nd of July. The bill was rendered to Schenley Distilleries Corporation, San Francisco, California, and I am advised that this bill would reflect all long distance telephone calls made by Mr. Robert H. Baglin during the period mentioned by the bill.

(Bill, Pacific Tel & Tel Co., to Schenley, June 11, 1946, marked Plaintiff's Exhibit 10-N for Identification.) [549]

Mr. Pickett: Now I have something more as to telephone calls, and this next paper refers to telephone calls made by Mr. Woolsey.

The paper, I may say, does not bear Mr. Woolsey's name. These items listed on this paper are excerpts from a report made by Mr. Woolsey, who is a lawyer under the supervision of Mr. Heymsfeld, to Mr. Heymsfeld, on his daily legal work.

I have taken from the report, which contains a great deal of matter which has nothing to do with this case, those excerpts which relate to telephone calls made by Mr. Woolsey, having to do with the

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

transaction which is the subject of suit. You will notice that in two places I have inserted asterisks. The asterisks relate to the substance of what I deem to be confidential communications between Mr. Donnelly and Mr. Woolsey, as attorney.

Q. (By Mr. Mesirov): Mr. Heymsfeld, Mr. Pickett has just handed me the memorandum which he has just described. Will you tell me who has possession of the original report from which this memorandum was made up?

A. I have the original, and Mr. Woolsey has a copy of it in San Francisco.

Mr. Mesirov: Mark it for identification.

(Paper containing excerpt from a report by Mr. Woolsey to Mr. Heymsfeld marked Plaintiff's [550] Exhibit 11-N for Identification.)

Mr. Pickett: Next, I have a copy of a memorandum from R. H. Baglin in the San Francisco office to Mr. C. Balzer dated May 20, 1946.

I have no extra copy of this.

Mr. Mesirov: Mark it for identification.

(Memorandum, R. H. Baglin to C. Balzer May 20, 1946, marked Plaintiff's Exhibit 12-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, referring to this memorandum which has just been produced and marked Plaintiff's Exhibit 12-N for Identification, will you tell us who Mr. C. Balzer is?

A. Mr. Balzer is an employee of the production department.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Where? A. He is presently——

Q. Where was he at that time?

A. At that time he was in Cincinnati.

Q. May, 1946? A. In Cincinnati.

Mr. Pickett: Next, I have a copy of a letter addressed to Harold A. Whipple Co. dated May 20, 1946, by Mr. R. H. Baglin. This is a photostat of the office copy. Of course, [551] the original presumably is in the office of Harold A. Whipple Company.

(Letter, R. H. Baglin to Harold A. Whipple Co., May 20, 1946, marked Plaintiff's Exhibit 13-N for Identification.)

Mr. Pickett: I now produce a letter, consisting of two pages, on the letterhead of Harold A. Whipple Co., addressed to Schenley Distilleries Corp., dated May 21, 1946. This letter is directed to the attention of Mr. R. H. Baglin.

Mr. Mesirov: Mark it for identification.

(Letter, Harold A. Whipple Co. to Schenley, attention of Mr. Baglin, May 21, 1946, marked Plaintiff's Exhibit 14-N for Identification.)

Mr. Pickett: Next, sir I produce a *telephone* dated May 21, 1946 addressed to Carl J. Kiefer, Schenley Distilleries Corp., signed J. B. Donnelly. I may say, sir, that I have two copies of that same telegram.

One appears to be the telegram as actually re-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

ceived by Mr. Kiefer and the other seems to be an office copy. I don't imagine we have to mark both.

Mr. Mesirov: Mark the original.

(Telegram, Mr. Donnelly to Mr. Kiefer, May 21, 1946, marked Plaintiff's Exhibit 15-N for Identification.) [552]

Mr. Pickett: Next, I produce a letter on the letterhead of Harold A. Whipple Co. dated May 23, 1946, bearing a mark "May 24, Recd" addressed to Schenley Distilleries Corp. and signed "Harold A. Whipple Co., Harold A. Whipple."

This letter is addressed to the attention of Mr. Baglin.

(Letter, May 23, 1946, Harold A. Whipple Co. to Schenley, attention Mr. Baglin, marked Plaintiff's Exhibit 16-N for Identification.)

Mr. Pickett: Next, I produce an inter-office communication addressed to Mr. Carl J. Kiefer from J. B. Donnelly, bearing date May 23, 1946, with the stamp of receipt in the upper right hand corner as May 27, 1946. This communication consists of three pages, and a fourth page, which was an attachment.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, May 23, 1946, Mr. Donnelly to Mr. Kiefer, marked Plaintiff's Exhibit 17-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, directing your attention to the photostatic copy of the

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

letter just produced, and just marked Exhibit 17-N, can you tell me what "Schenley Affiliates," which is at the top of the stationery, stands for?

A. That is a designation that we place on these inter-office communication forms, so that the sheets can be used interchangeably by the company and by all of the subsidiaries.

Mr. Pickett: I now produce a telegram dated May 27, 1946 addressed to J. B. Donnelly, Schenley Distilleries, Inc., signed "C. W. Metcalf."

Mr. Mesirov: Mark it for identification.

(Telegram, May 27, 1946, Mr. Metcalf to Mr. Donnelly, marked Plaintiff's Exhibit 18-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, what was Mr. Metcalf's position in Schenley on May 27, 1946?

A. He was employed as a consultant, principally on purchase of materials.

Q. As a regular employee or as an independent consultant?

A. I can't characterize it. He was not employed by Schenley exclusively. He had certain other business connections, which he continued.

Mr. Pickett: Next, I produce an original telegram dated May 27, 1946, addressed to C. W. Metcalf, Schenley Distillers Corporation and signed—I have to spell this to you, because the name is misspelled—"J. B. D-o-n-n-a-l-l-y." [554]

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Telegram, May 27, 1946, J. B. Donnally, to C. W. Metcalf, marked Plaintiff's Exhibit 19-N for Identification.)

Mr. Pickett: Next, I produce a copy of an inter-office communication addressed to Mr. I. J. Seskis from Carl J. Kiefer, dated May 28, 1946.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, Mr. Kiefer to Mr. I. J. Seskis, May 28, 1946, marked Plaintiff's Exhibit 20-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, who is I. J. Seskis?

A. He was, and is, a vice-president of Schenley Distillers Corporation.

Q. Where? A. His office is in New York.

Mr. Pickett: Next, I produce a telegram dated May 28, 1946, addressed to J. B. Donnelly, Schenley Distilleries, Inc., and signed "Chas. Balzer, Schenley Distilleries, Inc." with a handwritten notation in the lower right hand corner of the telegram.

Q. (By Mr. Mesirov): Mr. Heymsfeld, who is Charles Balzer?

A. That is the same Mr. Balzer that was identified [555] by me before.

Mr. Mesirov: Mark it for identification.

(Telegram, May 28, 1946, Mr. Balzer to Mr. Donnelly, marked Plaintiff's Exhibit 21-N for Identification.)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Next, I produce the original of an inter-company communication addressed to Mr. Chas. Metcalf, dated May 29, 1946, from Mr. Carl J. Kiefer. I may say, Mr. Mesirov, that we have found a copy of Exhibit 17-N, which undoubtedly was enclosed with the original of that memorandum.

Mr. Mesirov: To which this memorandum refers?

Mr. Pickett: That is correct.

Mr. Mesirov: Mark it for identification.

(Inter-company communication, May 29, 1946, Mr. Kiefer to Mr. Metcalf, marked Plaintiff's Exhibit 22-N for Identification.)

Mr. Pickett: Next, I produce an inter-office communication addressed to Mr. C. J. Kiefer, dated May 29, 1946 from C. W. Metcalf. This communication consists of a memorandum with two attachments, so it is three pages in all.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, Mr. Metcalf to Mr. Kiefer, May 29, 1946, marked Plaintiff's Exhibit 23-N [556] for Identification.)

Mr. Pickett: Next, I produce a telegram addressed—and the name is misspelled; I will spell it as it appears here—"J. B. Donnely" Schenley Distilleries, Inc., dated May 31, 1946, signed Carl J. Kiefer. In the lower right hand corner of this telegram there is a handwritten notation.

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Telegram, May 31, 1946, Mr. Kiefer to “Mr. Donnelly” marked Plaintiff’s Exhibit 24-N for Identification.)

Mr. Pickett: Next, I produce an inter-office communication addressed to Mr. C. J. Kiefer dated June 3, 1946 from C. W. Metcalf.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, June 3, 1946, Mr. Metcalf to Mr. Kiefer, marked Plaintiff’s Exhibit 25-N for Identification.)

Mr. Pickett: I will next produce a cablegram dated June 5th, addressed to Schenley Distillers, Cincinnati, Ohio, signed “Engraw.”

Mr. Mesirov: Mark it for identification.

(Cablegram, June 5, Engraw to Schenley, Cincinnati, marked Plaintiff’s Exhibit 26-N for Identification.) [557]

Mr. Pickett: Next, I produce a copy of a letter on the letterhead of Harold A. Whipple Co., dated June 5, 1946, addressed to Manny Blanc & Co., Inc., addressed to the attention of Mr. Bayles, at the bottom of which is a memorandum or letter beginning “Mr. Baglin:” and signed “Harold A. Whipple Co.” By “Harold A. Whipple.”

Mr. Mesirov: Mark it for identification.

(Letter, June 5, 1946, Harold A. Whipple Co. to Manny Blanc & Co., Inc., attention Mr. Bayles, marked Plaintiff’s Exhibit 27-N for Identification.)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Next is an original teletype message addressed to C. W. Metcalf and signed Carl J. Kiefer. The document itself doesn't bear the date it was sent, but it says, "Rec'd Cinti"—which I take to be Cincinnati—"June 6th" and there is a pencil notation on it "1946."

Mr. Mesirov: Mark it for identification.

(Teletype message, Carl J. Kiefer to C. W. Metcalf, marked "Rec'd Cinti June 6," marked Plaintiff's Exhibit 28-N for Identification.)

Mr. Pickett: Next I produce a copy of a telegram addressed to Manny Blanc & Co., Inc. dated June 6, 1946, addressed to the attention of Mr. Bayles and signed "Jas. E. Woolsey."

Mr. Mesirov: Mark it for identification.

(Telegram, June 6, 1946, Mr. Woolsey to Manny [558] Blanc & Co., Inc., attention of Mr. Bayles, marked Plaintiff's Exhibit 29-N for Identification.)

Mr. Pickett: Next, I produce a document, consisting of two pages, headed "Memo of telephone conversation with Harold A. Whipple—June 6, 1946." At the bottom of this document is the type-written name, "Jas. E. Woolsey."

Mr. Mesirov: Mark it for identification.

(Memo of telephone conversation with Harold A. Whipple, June 6, 1946, marked Plaintiff's Exhibit 30-N for Identification.)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Next, I produce a copy of a telegram addressed to Harold A. Whipple Co. dated June 7, 1946 signed Schenley Distillers Corporation, by Jas. E. Woolsey, assistant secretary.

Mr. Mesirov: Mark it for identification.

(Telegram, June 7, 1946, Mr. Woolsey to Harold A. Whipple Co. marked Plaintiff's Exhibit 31-N for Identification.)

Mr. Pickett: Next, I have a cablegram addressed to Schenley Distillers dated June 7th, signed "Berger Engraw."

Mr. Mesirov: Mark it for identification.

(Cablegram, June 7th, Berger Engraw to Schenley Distillers, marked Plaintiff's Exhibit 32-N for Identification.)

Mr. Pickett: I have here a record of a telephone conversation between Mr. Woolsey and Mr. Heymsfeld, which is not noted on that document which I gave you before, and which has been marked Plaintiff's Exhibit 11-N for Identification. This is a memorandum of a telephone conversation on June 11, 1946.

(Handing paper to witness.)

I am going to ask Mr. Heymsfeld about this, so the record will be clear.

Q. (By Mr. Pickett): Mr. Heymsfeld, I show you the paper which I have just referred to and ask you whether it refreshes your recollection that you had a telephone conversation with Mr. Woolsey on that day.

A. Yes, it does.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. At that time, what was Mr. Woolsey's position?

A. Well, he headed what we call the Compliance Department in our San Francisco office, which was the department in charge of legal affairs, and worked under my direction.

Mr. Mesirov: Off the record.

(Discussion off the record.)

Q. (By Mr. Pickett): (Continuing) Did he report to you, as the head of Schenley's legal department? A. He did. [560]

Q. And, without telling us what this telephone conversation of June 11, 1946 was, will you state whether or not it related to a communication of facts to you or whether it was a communication with respect to certain legal relationships?

Mr. Mesirov: I object to this. If you want to refuse to produce it, it is your privilege to refuse, and we will try to get it. But I am not going to let you try to draw from the witness some sort of an explanation, which would justify a plea of confidential communication. You ought to be able to tell from the letter whether you want to claim privilege.

Mr. Pickett: I will withdraw that question.

Q. (By Mr. Pickett): (Continuing) Without telling us the substance of this telephone conversation of June 11th, 1946, will you state whether or not it was a communication which you had with Mr. Woolsey regarding legal aspects of a controversy between the parties to this suit?

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Mesirov: Objected to. A conversation of which you have a written memorandum must speak for itself.

Mr. Pickett: Will you answer the question?

The Witness: Will you read that question to me?

(Question read.)

A. Yes. [561]

Mr. Mesirov: Wait a minute. Before you answer it, I further object on the ground that it calls for a conclusion.

Mr. Pickett: Now, will you answer the question?

The Witness: Yes, is my answer.

Q. Did you have a conversation with Mr. Woolsey in your capacity as general counsel for Schenley? A. Yes.

Mr. Mesirov: Will you mark it, please?

Mr. Pickett: I was just about to say, Mr. Mesirov, it is our position that this is a confidential communication, and therefore we will not produce it for inspection. I don't believe it falls within the scope of what you informed me is the order of the Court.

Mr. Mesirov: I ask that it be identified for the purpose of a further call for the production of this memorandum.

Mr. Pickett: Mr. Mesirov, I don't know how more I can identify it. I have read the heading, the date, and the name at the bottom.

Mr. Mesirov: One question.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, how do you distinguish the words addressed to you by Mr. Woolsey—as being addressed to you in your capacity as counsel, or in your capacity as secretary of the company, or in your capacity as director of Schenley?

A. There would be no occasion for Mr. Woolsey to [562] address me on that subject at all as a director or secretary of Schenley. It didn't fall within the duties of either office. Besides, it was my telephone call to him, and I suppose what you are asking for is my state of mind as to what I was doing when I called him. I was acting in a legal capacity. I was calling him about this case.

Q. Do you mean to tell me that Mr. Woolsey, who was your assistant, was appealed to by you for a legal opinion in this case?

A. No, I didn't appeal to him for a legal opinion in the case—although the fact that he was my assistant wouldn't foreclose my asking him for his opinion. I always ask my assistants' opinions.

Q. Did you in this telephone conversation ask for his legal opinion?

A. In this telephone conversation I asked him as to the results of an investigation——

Mr. Pickett: Just a moment.

The Witness: What?

Mr. Pickett: I would like to remind the witness that the claim of privilege is going to be raised. The witness should not testify as to the substance of the conversation.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

The Witness: Could I say something off the record?

(Discussion off the record.) [563]

Q. (By Mr. Mesirov): Mr. Heymsfeld, this memorandum which was produced by your counsel was so produced because it related to the controversy at issue?

Mr. Pickett: No, sir, that is not correct. I would like to have the record clear on that. This memorandum is produced because it records a telephone conversation between Mr. Woolsey and Mr. Heymsfeld. You have informed me that the order in this case refers to telephone calls between Mr. Woolsey and any executive offices. I would not regard this telephone conversation as falling within the scope of the order, because I don't believe that it was a telephone call between Mr. Woolsey and any executive officer or any executive office. But, rather than have any question on the matter and because I haven't seen the order, and I am not familiar as to what took place in California, I am mentioning, for the sake of completeness, that there was such a telephone call on June 11, 1946. That is why the paper was produced.

Mr. Mesirov: And I am asking the witness now on whose behalf you are producing the paper, whether this paper relates to the glucose transaction.

Q. You can answer yes or no.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Oh, I would say it has some relation.

Mr. Mesirov: You are answering the question.

Mr. Pickett: You want him to answer?

Mr. Mesirov: Yes.

Mr. Pickett: (To the witness) Do you want to see the paper again?

The Witness: (Referring to paper) The paper is headed "Memo of telephone conversation with Mr. Heymsfeld re: Argentine glucose."

Q. (By Mr. Pickett): And the telephone conversation was in reference to the Argentine glucose, is that a fact? A. That is correct, sir.

Q. The substance of the communication you claim to be privileged? A. That is correct.

Q. And you decline to answer?

A. That is correct.

Q. You decline to give us the substance or exhibit this memorandum? A. That is correct.

(Discussion off the record.)

Mr. Pickett: Next, I produce an unsigned memorandum which is headed "File memorandum," dated June 11, 1946, that has in the lower left hand corner the initials "CWM:MB" which I understand are the initials of Mr. Metcalf.

Mr. Mesirov: Mark it for identification. [565]

(File memorandum, June 11, 1946, marked Plaintiff's Exhibit 33-N for Identification.)

Mr. Pickett: Next, I produce an unsigned

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

memorandum headed "File memorandum" dated June 13, 1946. I am informed that that is a memorandum which Mr. Metcalf made.

Mr. Mesirov: Mark it for identification.

(File memorandum, June 13, 1946, marked Plaintiff's Exhibit 34-N for Identification.)

Mr. Pickett: Next, I produce a letter on the letterhead of Stanton & Stanton dated June 24, 1946 addressed to Schenley Distillers Corporation, attention Mr. Metcalf, and signed Louis B. Stanton.

Mr. Mesirov: Mark it for identification.

(Letter, June 24, 1946, Stanton & Stanton, to Schenley Distillers Corporation, attention Mr. Metcalf, marked Plaintiff's Exhibit 35-N for Identification.)

Mr. Pickett: Next, I produce a copy of a letter dated June 26, 1946, addressed to Mr. L. Stanton, signed Schenley Distillers Corporation, C. W. Metcalf.

Mr. Mesirov: Mark it for identification.

(Letter, June 26, 1946, Schenley to Mr. L. Stanton, marked Plaintiff's Exhibit 36-N for Identification.)

Mr. Pickett: Next, I produce a copy of what I take to be a cablegram dated 7/3/46, addressed to the plaintiff and [566] signed "Schenley Metcalf."

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Cablegram, 7/3/46, from Schenley Metcalf to the plaintiff, marked Plaintiff's Exhibit 37-N for Identification.)

Mr. Pickett: Next, I produce a document headed "Inter-office memorandum" dated July 11, 1946, and at the bottom having the name, typewritten, "C. W. Metcalf."

Mr. Mesirov: Mark it for identification.

(Inter-office memorandum, July 11, 1946, with name of "C. W. Metcalf" typed at bottom, marked Plaintiff's Exhibit 38-N for Identification.)

Mr. Pickett: Next, I produce the original of the document headed "Inter-office communication" dated July 12th, 1946, and bearing Mr. Metcalf's initials, and the name, in typewriting, "C. W. Metcalf."

Mr. Mesirov: Mark it for identification.

(Inter-office communication, July 12, 1946, bearing Mr. Metcalf's name, marked Plaintiff's Exhibit 39-N for Identification.)

Mr. Pickett: Next, I produce the original of a memorandum headed "Schenley Affiliates, Inter-office communication" addressed to Mr. R. T. Heymsfeld, dated June 7, 1946, and bearing the typewritten signature of James E. Woolsey. [567]

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Inter-office communication, June 7, 1946, Mr. Woolsey to Mr. Heymsfeld, marked Plaintiff's Exhibit 40-N for Identification.)

Mr. Pickett: Next, I produce the original of a cablegram addressed to Schenley Distillers dated June 15, 1946 signed "Engraw."

Mr. Mesirov: Mark it for identification.

(Cablegram, June 15, 1946, Engraw to Schenley, marked Plaintiff's Exhibit 41-N for Identification.)

Mr. Pickett: Next, I produce a cablegram dated July 12, presumably 1946, addressed to "Metcalf, Schenley Distillers" signed "Engraw."

Mr. Mesirov: Mark it for identification.

(Cablegram, July 12th, Engraw to Metcalf, Schenley Distillers, marked Plaintiff's Exhibit 42-N for Identification.)

Mr. Pickett: Next I produce the original of a document, consisting of five pages, bearing the letterhead of plaintiff, from Mr. G. Fred Berger, to Mr. E. R. Dichter, dated August 2, 1946. If I recall correctly, a copy of this document has already been marked as an exhibit on a previous deposition.

Mr. Mesirov: That is right, this being the original of a copy shown to Emanuel R. Dichter and identified by him [568] and marked Plaintiff's Exhibit 6-N.

Mr. Pickett: The next document I have is an original letter from plaintiff address to Ralph

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Heymsfeld, Esq., dated September 18, 1946, and signed in the plaintiff's name by G. Fred Berger, president. I also have the envelope attached to the letter.

Mr. Mesirov: Mark it for identification.

(Letter, September 18, 1946, plaintiff, by G. Fred Berger, president, to Ralph Heymsfeld, with accompanying envelope, marked Plaintiff's Exhibit 43-N for Identification.)

Mr. Pickett: Next, I produce a copy of a letter to plaintiff, dated September 20, 1946, from the defendant, bearing Mr. Heymsfeld's name.

Mr. Mesirov: Mark it for identification.

(Letter to plaintiff from the defendant, by Mr. Heymsfeld, September 20, 1946, marked Plaintiff's Exhibit 44-N for Identification.)

Mr. Pickett: Next, I produce the original of a letter on the letterhead of plaintiff dated September 20, 1946, addressed to Ralph Heymsfeld, Esq., bearing what appears to be the signature of G. Fred Berger.

Mr. Mesirov: You don't mean to say that?

Mr. Pickett: Bearing what purports to be the signature of G. Fred Berger. [569]

Mr. Mesirov: The initial of the person who signed it is below it.

Mark it for identification.

(Letter, September 20, 1946, Plaintiff to

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Ralph Heymsfeld, marked Plaintiff's Exhibit 45-N for Identification.)

Mr. Pickett: Next, I produce the original of a letter bearing the letterhead of Mesirov & Leonards, dated October 29, 1946, addressed to Ralph Heymsfeld, Esq. and signed Harry S. Mesirov. I also produce the envelope in which that letter was sent.

Mr. Mesirov: Is that in accordance with our call, Mr. Pickett? I don't think you have any right to produce it here today, but I don't care. I wrote it. I don't deny it.

(Letter, October 29, 1946, Mesirov & Leonards to Ralph Heymsfeld, marked Plaintiff's Exhibit 46-N for Identification.)

Mr. Pickett: Next, I produce a copy of a letter to Harry S. Mesirov, Esq., dated October 31, 1946, signed Schenley Distillers Corporation, Ralph T. Heymsfeld.

Mr. Mesirov: Is that in response to our call? I don't see why you should produce it.

Mr. Pickett: If you don't want it I am not going to insist on having it marked. [570]

(Discussion off the record.)

Mr. Pickett: Mr. Mesirov., I have been going through these voluminous papers and I may have missed one or two, although I don't think so, which would fall within what you tell me is the order of the Court, and I will review this file again before you close the deposition of Mr. Heymsfeld, and if

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

I have any more that falls within the purview of what you tell me is the Court's order, of course I will produce it.

Q. (By Mr. Mesirov): Mr. Heymsfeld, are there any other memoranda or letters or other documents which you have not produced because you deem them to be confidential communications, outside of the one that you produced and refused to give the contents of?

A. My understanding was that we would produce all of the documents that fall within the call, without regard to whether or not they were confidential or privileged communications, that being our understanding of the rule, and that we would indicate what documents we refused to submit for your inspection, of the group of documents that we produced.

Q. Do I understand that your answer is that there are no other documents which you have failed to produce because you consider them confidential?

Mr. Pickett: Do you want me to answer that question, Mr. Mesirov? [571]

Mr. Mesirov: Yes.

Mr. Pickett: I said I will have to review this file again to see whether there are any documents falling within these five matters to which you refer as being contained in the court order, to make sure that we have produced them, and if we have them, I will produce them. If they happen to be confidential——

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Mesirov: Whether they be confidential or not.

Mr. Pickett: That is correct. You understand that I am not waiving any privilege. In other words, if the document is privileged, what we claim is privileged, we will raise the question.

Mr. Mesirov: The question was whether you will produce them. That is all.

Mr. Pickett: That is right.

Q. (By Mr. Mesirov): You have been subpoenaed to produce here all written, and memoranda of oral, instructions, telephone calls, and reports, and all correspondence, memoranda, telegrams and cables relating to the negotiations for the purchase and disposition of the glucose involved in this suit, which passed between and among the defendant corporation, its affiliates, its subsidiaries, its and their officers, agents and employees, the plaintiff, plaintiff's officers and agents, G. Fred Berger, Harold A. Whipple, Harold A. Whipple Co., [572] Joseph B. Donnelly, Robert H. Baglin, Ralph Heymsfeld, Emanuel R. Richter, Charles W. Metcalf, James E. Woolsey, defendant's New York office, defendant's San Francisco office, defendant's Cincinnati office and defendant's South American offices, both prior and subsequent to May 23, 1946.

What papers have you produced here in answer to that subpoena?

A. All of the papers called for by the subpoena are here in the possession of Mr. Pickett.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Will you produce them?

Mr. Pickett: I have already produced a number of those papers. In addition, I have various other papers. They are here.

(Discussion off the record.)

(Whereupon, at 1 o'clock p.m., an adjournment was taken to 2:15 o'clock p.m.)

Afternoon Session

Mr. Pickett: Mr. Mesirov, will you state when you claim that the negotiations for the purchase and disposition of the glucose involved in this suit terminated?

Mr. Mesirov: As far as my understanding goes, it [573] terminated on September 20, 1946, by a letter marked Plaintiff's Exhibit 44-N.

Mr. Pickett: I will say that I do not agree and do not concede that any such negotiations continued until that date, but I will be guided by your statement in undertaking to produce the documents which fall within the subpoena as you so interpret it.

Mr. Mesirov: I would say the 20th, the date of that letter. If, however, you know of any subsequent communications showing continuous negotiation, then I shall ask you to produce that.

Mr. Pickett: And I will state that I know of no such documents. Indeed, my position is that those

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

negotiations had terminated long prior to the date you give.

(Discussion off the record.)

Mr. Pickett: I have certain documents, Mr. Mesirov, to and from Mr. Woolsey, which may relate to the negotiations referred to in the subpoena. These documents requested and conveyed certain legal advice. For that reason, I deem that they are privileged, and while we have produced the documents, I am not tendering them to you for inspection.

Mr. Mesirov: As the witness is not here, I will address my questions to you.

Will you give us the date of these communications, and the parties between whom they were exchanged? You gave us [574] only one of the parties.

Mr. Pickett: Yes, sir. There are three documents. The first is dated May 15, 1946; the second is dated May 17, 1946, and the third is dated May 20, 1946, and the communications are between Mr. Woolsey and Mr. R. H. Baglin.

Mr. Mesirov: All right. You claim they are privileged?

Mr. Pickett: Yes, sir.

Mr. Mesirov: And you refuse to exhibit them or have them marked for identification?

Mr. Pickett: Yes, unless we are directed by the Court to exhibit them. We stand on our claim of privilege.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

I next have an undated handwritten memorandum which is headed C. B. and signed D. E. If you wish me to state what my information is as to what this document is, I will state for the record. I am advised that this is a handwritten memorandum from Mr. Carl Kiefer to his assistants in the Cincinnati office, Mr. Balzer and Mr. Eberts.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov. Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 47-N for Identification.)

Mr. Pickett: I have a memorandum from Mr. Milton B. Seasonwein, dated May 28, 1946, addressed to Mr. Woolsey in [575] San Francisco. Mr. Seasonwein, as this memorandum shows, is in the law department in the New York office. If you will accept my statement, Mr. Seasonwein is a lawyer.

Mr. Mesirov: I take your word for it.

Mr. Pickett: We regard this memorandum as privileged, also, and for that reason I will not disclose it for your inspection.

I also have a memorandum from Mr. Woolsey to Mr. Seasonwein, dated June 3, 1946, in response to the document which I just mentioned, which I also deem privileged, and for that reason will not produce for your inspection.

I also have a document dated June 4, 1946, being

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

a communication from Mr. Woolsey to Mr. Baglin—Mr. R. H. Baglin—which I deem privileged, and for that reason will not produce for your inspection.

Mr. Mesirov: All right, sir.

Mr. Pickett: Next I have a memorandum from Mr. G. E. Baglin to Mr. Woolsey, dated June 5, 1946. I am informed that Mr. G. E. Baglin is a lawyer who is a subordinate of Mr. Woolsey. We deem this document privileged, and for that reason will not produce it for your inspection.

I may say that Mr. G. E. Baglin is not the same person as Mr. R. H. Baglin.

Mr. Mesirov: There is a date there, isn't there?

Mr. Pickett: Yes. [576]

Next I have a typewritten sheet of paper dated June 24, 1946, which is headed "Statement for Dichter." It bears no signature and there is no name at the bottom, but for the purposes of identification, I will state that I am informed that this was prepared by Mr. Metcalf. We are producing that for your inspection.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Pickett: I will state again producing this and various other papers, I am in no way conceding that there were any negotiations for the purchase or disposition of the glucose involved in this suit at this particular time, but since you have already stated to me your understanding of what the subpoena covers, I am making the production now so

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

that we do not have to go to the trouble of getting a new subpoena if there is any question about that matter.

Mr. Mesirov: Mark that.

(The above described document was there-upon marked Plaintiff's Exhibit 48-N for Identification.)

Mr. Pickett: Next I produce the original of the cablegram addressed to C. W. Metcalf, Schenley, dated June 30, 1946, signed Dichter.

(The above described document was there-upon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that. [577]

(The above described document was there-upon marked Plaintiff's Exhibit 49-N for Identification.)

Mr. Pickett: Next is a copy of what evidently was a cable to Mr. Dichter signed C. W. Metcalf and dated 7-2-46.

(The above described document was there-upon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was there-upon marked Plaintiff's Exhibit 50-N for Identification.)

Mr. Pickett: Next I produce a carbon copy of what evidently was a cable to Mr. Dichter signed Metcalf, dated 7-3-46.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 51-N for Identification.)

Mr. Pickett: Next I produce the original of the cable addressed to Metcalf, Schenley, signed Dichter. The date is the 9th of July, 1946.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 52-N for Identification.) [578]

Mr. Pickett: I now produce a carbon copy of a cablegram to Mr. Dichter signed Schenley, Metcalf, dated July 10, 1946.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 53-N for Identification.)

Mr. Pickett: Next I produce what purports to be a copy made of a cablegram addressed to Metcalf, Schenley, signed Dichter, bearing the notation received July 26, presumably 1946, from Rio

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

de Janeiro. This is not the original document or an office copy. It appears to be a copy made from an original document.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 54-N for Identification.)

Mr. Pickett: Next I have a memorandum headed, "Memorandum for the file," bearing Mr. Heymsfeld's name at the bottom, and dated June 6, 1946. This document relates to certain legal advice which Mr. Heymsfeld had given and for that reason I claim that it is privileged and I am not submitting it to you for your inspection. [579]

Mr. Mesirov: Does that memorandum show to whom it was furnished?

Mr. Pickett: The memorandum does not indicate it was furnished to anybody. It is headed, "Memorandum for the file."

Next I have a memorandum dated June 10, 1946, bearing Mr. Heymsfeld's name at the bottom. It is not addressed to anybody, and I gather that it is another memorandum for the file. This memorandum I also deem to be privileged and for that reason I am not submitting it for your inspection.

Next I have a memorandum to Mr. Heymsfeld from Mr. Metcalf, dated June 24, 1946, which I

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

deem to be privileged and for that reason I am not submitting it for your inspection.

Next I have a memorandum to Mr. Metcalf from Mr. Heymsfeld, dated June 26, 1946, which I deem to be privileged, and for that reason I am not submitting it for your inspection.

Next I have a memorandum dated 7-3-46. It is addressed by initials only to Mr. Heymsfeld and signed by initials which are those of Mr. Metcalf.

(The above described document was handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon [580] marked Plaintiff's Exhibit 55-N for Identification.)

Mr. Pickett: Next I have a memorandum from Mr. Heymsfeld, dated July 12, 1946, to Mr. Casden. If you will accept my statement, Mr. Mesirov, Mr. Casden is a lawyer in the New York office of Schenley, working under Mr. Heymsfeld's supervision. I deem this memorandum privileged and for that reason I am not submitting it for your inspection.

Mr. Mesirov: I accept your statement with regard to everything except with regard to their being privileged communications.

Mr. Pickett: I don't expect you to concede that.

Mr. Mesirov: And I may say right here that I shall ask you to add all of these papers which you are now declining to produce for my inspection, be-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

cause they are privileged communications, here on Thursday, October 30, at which time Mr. Heymsfeld is to return for examination, so that I may examine him with relation to these papers.

Mr. Pickett: Surely.

Mr. Mesirov, I have here a letter written to Mr. Heymsfeld by Mr. Hosey. In fact, I have two letters: one is written on the letterhead of Energetic Worsted Corporation and the other Engraw Export and Import Company. Both of those letters are dated August 7, 1946. I do not know whether Mr. Hosey is or is not an officer or agent of the [581] plaintiff.

Mr. Mesirov: You have noticed that that is not the plaintiff. I really do not recall, and I have not papers here from which I could answer that question. If it is necessary, I can call up and get the minutes.

Mr. Pickett: It is not necessary. I am offering to produce them for your inspection if they come within the subpoena.

Mr. Mesirov: If they do not, it does not matter and I do not think there is much relevancy either. Mark them.

(The above described documents were thereupon marked Plaintiff's Exhibits 56-N and 57-N for Identification.)

Mr. Pickett: I now produce a memorandum dated August 27, 1946, headed "Memorandum for

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

the file," bearing Mr. Heymsfeld's initials at the bottom. This memorandum consists of two pages.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 58-N for Identification.)

Mr. Pickett: Next I have a memorandum dated September 5, 1946 headed, "Memorandum for the file," bearing Mr. Heymsfeld's initials. This memorandum is three pages. [582]

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 59-N for Identification.)

Mr. Pickett: Next I produce the original of a letter dated September 10, 1946, addressed to Mr. Heymsfeld on the letterhead of Energetic Worsted Company signed J. L. McManus.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was there-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

upon marked Plaintiff's Exhibit 60-N for Identification.)

Mr. Pickett: I now produce a carbon copy of a letter to Mr. McManus dated September 11, 1946, signed by Mr. Heymsfeld.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 61-N for Identification.)

Mr. Pickett: I now produce a memorandum dated September 17, 1946, headed "Memorandum for the files," bearing Mr. Heymsfeld's initials. That is the answer. [583]

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark it.

(The above described document was thereupon marked Plaintiff's Exhibit 62-N for Identification.)

Mr. Pickett: Mr. Mesirov, will you stipulate that both parties may substitute photostatic copies for any exhibits produced by either side during the depositions of Mr. Metcalf, Mr. Dichter and Mr. Heymsfeld.

These photostatic copies will be marked to conform to the original exhibits. A set of these photo-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

static copies to be attached to the original deposition and may be used for all purposes in place of the original documents?

Mr. Mesirov: Yes.

Mr. Pickett: It is hereby stipulated the examination is adjourned to Thursday, October 30, 1947, at 10:15 o'clock a.m., at the office of Schenley Distillers Corporation, 37th Floor, 350 Fifth Avenue, New York.

(Adjourned to Thursday, October 30, 1947,
at 10:15 o'clock a.m.)

DEFENDANT'S EXHIBIT No. R-1

In the District Court of the United States for the
Southern District of New York

File No. M-8-85

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
Corporation,

Defendant.

SUBPOENA DUCES TECUM

To: Emanuel R. Dichter, residing at 150 Bennett
Avenue (also known as 150 Bennett Street)
Manhattan Borough, New York City:

(1780 Broadway N Y C) (in pencil)

Charles W. Metcalf, residing at 330 Park Avenue,
Manhattan Borough, New York City;

Ralph T. Heymsfeld, individually and as attorney for Schenley Distillers Corporation, place of business at 350 Fifth Avenue, Manhattan Borough, New York City:

You and Each of You Are Commanded to appear before James B. Kilsheimer, Jr., a Notary Public, duly commissioned and sworn and duly authorized to administer oaths under the laws of the State of New York, at his office located at 10 East 40th

Defendant's Exhibit No. R-1—(Continued)

Street, in the City, County and State of New York, on the 8th day of October 1947 at 10:30 o'clock in the forenoon and to take your several depositions upon oral examination.

And said Emanuel R. Dichter; Charles W. Metcalf and Ralph T. Heymsfeld are to bring with them and produce at the time and place aforesaid all written, and memoranda of oral, instructions, telephone calls, and reports, and all correspondence, memoranda, telegrams and cables relating to the negotiations for the purchase and disposition of the glucose involved in this suit, which passed between and among the defendant corporation, its affiliates, its subsidiaries, its and their officers, agents and employees, the plaintiff, plaintiff's officers and agents, G. Fred Berger, Harold A. Whipple, Harold A. Whipple Company, Joseph B. Donnelly, Robert H. Baglin, Ralph Heymsfeld, Emanuel R. Dichter, Charles W. Metcalf, James W. Woolsey, defendant's New York office, defendant's San Francisco office, defendant's Cincinnati office and defendant's South American offices, both prior and subsequent to May 23, 1946, and then and there to testify on behalf of the Plaintiff in the above-entitled action pending in said United States District Court of the United States for the Southern District of California wherein Compania Engraw Comercial E Industrial S.A., is Plaintiff, and Schenley Distillers Corporation (a corporation) is Defendant. [586]

Witness, the Honorable Alfred C. Coxe, District

Defendant's Exhibit No. R-1—(Continued)
Judge of the United States, for the Southern District of New York, this 30th day of September, 1947.

/s/ WILLIAM V. CONNELL,
Clerk.

(In handwriting:)
So Ordered 9/30/47

/s/ ALFRED C. COXE,
U.S.D.J.

STANTON & STANTON,
Attorneys for Plaintiff, 740 South Broadway, Suite
1004-09, Los Angeles 14, California. [587]

District Court of the United States, Southern
District of New York

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S.A. a Corporation,
Plaintiff,
against

SCHENLEY DISTILLERS CORPORATION, a
Corporation,
Defendant.

SUMMONS AND COMPLAINT AFFIDAVIT
OF SERVICE (CORPORATION)

State of New York,
County of New York

Vincent Kunigenas, being duly sworn, deposes

Defendant's Exhibit No. R-1—(Continued)

and says: that on the 2nd day of October, 1947, at No. 350 Fifth Avenue, Borough of Manhattan, City of New York, he served the within Subpoena Duces Tecum upon Schenley Distillers Corporation, a domestic corporation, the defendant therein named, by delivering to and leaving a true copy thereof personally with Ralph T. Heymsfeld, an officer of said corporation, to wit, its attorney.

Deponent further states that he knew the corporation so served as aforesaid to be the same corporation mentioned and described in the saie Subpoena Duces Tecum as the defendant therein, and knew the said Ralph T. Heymsfeld to be such officer at that time.

Deponent is over the age of 21 years and not a party to the action.

/s/ VINCENT KUNIGENAS.

Sworn to before me, this 3rd day of October, 1947.

JOSEPH GILLMAN,

Commissioner of Deeds,

N. Y. Co. Clk's No. 130.

Commission Expires December 17, 1948.

Defendant's Exhibit No. R-1—(Continued)
District Court of the United States, Southern
District of New York

COMPANIA ENGRAW COMMERCIAL E IN-
DUSTRIAL S. A., a Corporation,
Plaintiff,
against

SCHENLEY DISTILLERS CORPORATION, a
Corporation,
Defendant.

AFFIDAVIT OF SERVICE AND AFFIDAVIT
OF INVESTIGATION UNDER SOLDIERS'
AND SAILORS' CIVIL RELIEF ACT

State of New York,
County of New York—ss.

Harry White, being duly sworn, deposes and
says:

I reside at NYC; that on the 6th day of Oct., 1947,
at No. 1780 Broadway, Borough of Manhattan, City
of New York, I served the within subpoena upon
Charles W. Metcalf, the witness in this action, by
delivering to and leaving a true copy of said sub-
poena with said witness personally. I further state
that I knew the person so served as aforesaid to
be the same person mentioned and described in the
saie subpoena as the witness in this action. De-
ponent gave to witness a fee of 50c.

I am over the age of 21 years and not a party to
the action.

Defendant's Exhibit No. R-1—(Continued)

That the said defendant is not in the Military Service of any country allied with this nation in the conduct of the present war, nor has the said defendant received notice of induction into the armed forces of the United States.

/s/ HARRY WHITE.

Sworn to before me this 7th day of October, 1947.

JOSEPH GILLMAN,

Commissioner of Deeds,

N. Y. Co. Clk's No. 130.

Commission Expires December 17, 1948.

District Court of the United States, Southern
District of New York

COMPANIA ENGRAW COMMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

against

SCHENLEY DISTILLERS CORPORATION, a
Corporation,

Defendant.

AFFIDAVIT OF SERVICE AND AFFIDAVIT
OF INVESTIGATION UNDER SOLDIERS'
AND SAILORS' CIVIL RELIEF ACT

State of New York,
County of New York—ss.

Vincent Kunigenas, being duly sworn, deposes

Defendant's Exhibit No. R-1—(Continued)
and says: I reside at New York City; that on the 2nd day of October, 1947, at No. 350 Fifth Avenue, Borough of Manhattan, City of New York, I served the within Subpoena Duces Tecum upon Ralph T. Heymsfeld, the defendant in this action, by delivering to and leaving a true copy of said Subpoena Duces Tecum with said defendant personally. I further state that I knew the person so served as aforesaid to be the same person mentioned and described in the said Subpoena Duces Tecum as the defendant in this action.

Deponent gave defendant a fee of \$1.00.

I am over the age of 21 years and not a party to the action.

I asked him whether he was in the service of the United States Government in any capacity whatever. He told me he was not. He was clad in ordinary civilian clothes and wore no uniform of any kind. Upon information and believe I aver that the defendant is not in the military service of the United States at the present time as that terms is used in the Act of Congress known as "The Soldiers and Sailors Civil Relief Act." The sources of my information and grounds of my belief are the conversations above narrated.

That the said defendant is not in the Military Service of any country allied with this nation in the conduct of the present war, nor has the said

Defendant's Exhibit No. R-1—(Continued)
defendant received notice of induction into the
armed forces of the United States.

/s/ VINCENT KUNIGENAS.

Sworn to before me this 3rd day of October,
1947.

JOSEPH GILLMAN,
Commissioner of Deeds,
N. Y. Co. Clk's No. 130.

Commission expires December 17, 1948.

Western Union
Buenos Aires, July 8, 1946.

NLT

C W Metcalf

Schenley Distillers

New York N Y

Cancellation here would cost approximately forty-five thousand Dollars stop However opening of letter credit would at once eliminate penalty to extent of thirty thousand Dollars and would provide necessary time for orderly liquidation over contract period which is for balance 1946 stop Also sale over such extended period should further reduce probable loss if any to nominal amount therefore we suggest we act as your agents to liquidate contracts using our judgment as to manner of liquidation having in mind reduction of loss to minimum or entirely stop If agreed please advise so we can inform contractors and open lettercredit thru Firstboston these

Defendant's Exhibit No. R-1—(Continued)
calculations dont cover Whipl will you deal with
him directly.

ENGRAW DICHTER BERGER

Western Union

July 18, 1946.

NLT

MOMSEN

New York

608 Reschenley replying your todays cable first
twenty per cent letter credit represents eightyfive
thousand dollars approximately required by suppli-
ers as one contract condition second should Schenley
prefer flatly perform contract on terms originally
agreed with Engraw and Losangeles agent obviously
the items covering the latters compensation would
be eliminated however the proposal contained in
Engraw Dichter cable July eighth is different for
it consists in Schenley authorizing Engraw liqui-
date glucose contracts at best possible price to re-
duce or eliminate Schnley loss hence logical En-
graw and Losangeles agent expect reasonable com-
pensation third because there is no assurance mar-
ket prices shall remain as they are today during
next six months namely for time stipulated for pro-
ducing and delivering glucose under the contract
stop moreover there is always possibility Argentine
government withholds exportation permits glucose
fourth we have Metcalfs approval for representing
Schenley in premises moreover we are lawyers for

Defendant's Exhibit No. R-1—(Continued)

Schenley in other matters stop in this particular case intervening as mediators in endeavour effect fair amicable settlement telephoning tomorrow noon.

GOYTIA.

ingles

Victor Daniel Goytia

Avda R.S. Pena 501

Western Union

NLT

New York

609 pending Monday telephone conversation note following one advise should you or we attempt bring Whipple in proposed settlement two does Schenley wish us work here on theory liquidating glucose their account according Dichter Engraw cable Metcalf July eighth and Engraws Metcalf July twelfth or would they be inclined we work on basis cancellation contract.

GOYTIA.

Ingles

Victor Daniel Goytia

Av. R.S. Pena 501

Registro de Exp 8597-P. Cargar cuenta Estudio
Dres. Goytia.

Western Union

Julio 22 de 1946.

NLT

MOMSEN

New York

610 cannot withhold longer glucose suppliers

Defendant's Exhibit No. R-1—(Continued)
therefore indispensable you procure authorization
liquidate or else cancel contract stop Dichter En-
graw judge liquidation preferable we also recom-
mend stop Engraw received today Whipples author-
ization act his agent hence our opinion good chance
settling matter providing clients select either method
aforementioned cable reply.

GOYTIA.

Victor Daniel Goytia

Av. R.S. Pena 501

Reg. de Exp 85970P Cargar cuenta Estudio Dres.
Goytia.

Compania Englaw

Comercial E Industrial S.A.

San Martin 329

Buenos Aires (Argentina)

U. T. 31—8311

T. T. 387

Inter-Office Communication

Buenos Aires, August 2nd, 1946.

From Mr. G. Fred Berger

To Mr. E. R. Dichter.

Subject: Glucose Contracts

After numerous cables during April and May
covering the subject of the sale of glucose thru
Mr. Whipple in Los Angeles, we finally received a
telegram under date of May 20th accepting for par-
ties then unknown to us, an offer for 1300 tons
which we had made on April 24th and May 9th.

Defendant's Exhibit No. R-1—(Continued)

We immediately replied advising Whipple that it was impossible to hold offers firm in a market for glucose such as this has been.

On May 21st, we advised Whipple by L. C. that we had available, subject to prior sale, 600 tons at Arg. Pesos \$1.30 per kilo and outlined conditions of payment which included 25% deposit in cash and advised him also that we would endeavor to secure an additional amount up to the 1300 tons if he confirmed the price offered in this telegram, i.e. A.P. \$1.30.

On the 22nd of May, we received a telegram from Mr. Whipple, accepting the 600 tons at \$1.30 and offering to accept the balance of the 1300 tons at the same price. In this cable he also advised us that Schenley was the purchaser and would open credit for the entire amount but without a cash deposit which had been requested in our telegram of May 21st, according to the requirement of the supplier.

Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible (our price being \$1.20 F.A.S. and our offer thru Whipple being at \$1.30 F.O.B. so that we had a F.A.S. F.O.B. cost of approximately five centavos, leaving a net to us of five centavos on our F.O.B. offer of \$1.30, subject of course, to special storage charges if deliveries did not coincide with steamer availability) and the suppliers now knowing Schenley as the purchaser

Defendant's Exhibit No. R-1—(Continued)
dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.

Under date of May 22nd, we sent an N.L.T. advising Mr. Whipple that we had made the necessary arrangements for 1135 tons to be shipped as follows:

June, 50 tons; July, 60 tons; August-September, 200 tons; September, 150 tons; October, 275 tons; November, 200 tons; December, 200 tons.

Contracts to cover this were signed as follows:

600 tons, May 23rd; 60 tons, May 22nd; 200 tons, May 23rd; 75 tons, May 24th; 150 tons, May 22nd; 50 tons, May 27th. [597]

Under date of May 23rd, 1946, your Mr. J. B. Donnelly at your San Francisco office, wrote to Whipple starting his letter "this letter will confirm our telephone conversation and your letter of May 21st" the acceptance being the original 600 tons mentioned earlier in this letter. However, as a P.S. to this letter, Mr. Donnelly added "since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows"; this shipping schedule is the same as we outlined in our telegram of May 22nd so that undoubtedly the body of his letter was dictated some time earlier than the P.S. tho the entire letter was dated May 23rd.

I have mentioned these dates for the simple reason that apparently there seems to be some doubt

Defendant's Exhibit No. R-1—(Continued)

expressed as to the order in which these contracts were made. We closed them after receiving Whipple's instructions that the sale had been made to Schenley and our advice to Mr. Whipple under date of May 22nd, via N.L.T. so stated, "acting on your cable 21st, have completed firm purchases for account Schenley Distilleries 1135 tons stop" and then we added the shipping schedule which Mr. Whipple must have received under date of May 23rd.

Mr. Donnelly confirms the acceptance of this offer, his letter being dated May 23rd but please note that Mr. Donnelly's letter of May 23rd confirms a telephone conversation and also Mr. Whipple's letter of May 21st. Mr. Whipple wired us on the 21st, via night letter, which we received the morning of the 22nd, advising us of the approval of the purchase of the entire amount up to 1300 tons and that Schenley would open their credit for the entire amount.

Accordingly, the question of the timing and dating of contracts appears to be one of whether or not there is good faith all around.

It is obvious that we acted in the completion of these contracts only on the strength of our dependence on the fact that this purchase was being made for Schenley of whose credit I am fully familiar as a former banker.

Without attempting to enter into a controversy it would seem that if the present opinion is that we purchased without authority from Schenley, then

Defendant's Exhibit No. R-1—(Continued)

it seems only fair to point out that in Mr. Donnelly's letter to Mr. Whipple, he in turn, in his P.S., acknowledged and accepted "the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows" that shipping schedule having been sent by us to Whipple in our N.L.T. of May 22nd so that obviously there was an offer and an acceptance if there was no purchase for account of Schenley.

Under date of June 4th, we received the first telegram from Whipple advising us that apparently something had gone amiss with the contracts, the objection at that time seeming to be based on a required analysis of the glucose.

We immediately advised Whipple of the analysis of the purchase we had made and also advised that our purchase had been made within the requirement of 43-45 Baume U.S.P.

Then, on the 5th of June, I wired Schenley at Cincinnati (Mr. Whipple's wire noted Cincinnati headquarters were refusing to authorize the credit) quoting to them the purchases we have made and the analysis of the test of the spot purchase we had already made in order to be certain to cover their requirements advising them at the same time that each delivery would be subject to a similar test for their protection.

Under date of June 6th, Mr. Whipple advised us that he had obtained a part of an earlier sample we had sent him and forwarded this to the Schenley laboratory in Chicago.

Defendant's Exhibit No. R-1—(Continued)

Under date of June 8th, I sent a second wire to Cincinnati asking for a reply and under date of June 12th, we received an N.L.T. from Mr. Metcalf regretting the confused situation which had developed and suggesting that we advise him at New York of the extent of the uncancellable commitments.

After the exchange of various other telegrams under date of June 14th, I wired Schenley of New York that in order [600] to eliminate further confusion, we were cabling Whipple the extent of uncancellable commitments and the amount of liquidation damages, having ascertained at this time that we could cancel the largest contract for a ten centavos per kilo payment.

Mr. Dichter then reached Buenos Aires and made contact with us and as a result, we sent a joint cable to Mr. Metcalf under date of July 8th, outlining in effect that it would cost approximately U\$S 45.000.— to cancel but that if a letter of credit was opened (a 20% requirement of the total was later arranged) the cancellation penalty of U\$S 30.000.— would be eliminated and this action would also provide the time for orderly liquidation over the contract period which is the balance of 1946.

We also expressed our belief that there need be no loss in connection with the balance of the contract for it we act as the agent for Schenley to liquidate the contracts, we believe that unless something untoward and drastic were to happen, we

Defendant's Exhibit No. R-1—(Continued)
should be able to liquidate the contracts without loss to any one.

We also took up the matter by cable with Mr. Whipple in order to ascertain the minimum amount of commission for which he would settle and he has left the matter in our hands.

Later telephone conversations with Mr. Metcalf disclosed that apparently he was satisfied to leave the further decision [601] in connection with liquidation or cancellation in our hands together with Dr. Victor Goytia, the Argentine member of the firm Momsen, Freeman and Goytia.

We discussed this matter with Dr. Goytia who exchanged cables with his New York office but during Mr. Metcalf's absence, apparently the legal department chose to take a stand different than that taken by Mr. Metcalf and the situation then became complicated.

As of the end of July, it became necessary for us to assume that Schenley would wish to liquidate (which liquidation Messrs. Dichter, Goytia and Berger had jointly recommended) and in order not to be in violation of the contracts we had entered into for account of Schenley, we picked up a further 160 tons of glucose so that we now have approximately Arg. Pesos \$250.000.— of our funds involved without requiring any advances up to this time.

But the major contractor is now pushing us for a decision as to whether we are cancelling or liquidating (and he is in a position to do so for there

Defendant's Exhibit No. R-1—(Continued)

has been not deposited the required Schenley credit for 20% of the total contract) and it will be necessary for us to give him an answer shortly.

We personally cannot cancel without violating the contracts into which we entered for account of Schenley, and if we violate them—they having been registered with the Chamber of Commerce,—we might just as well go out of business. [602]

On the other hand, based on our funds already involved in taking up the July commitments (and there are 300 tons available in August) we are not in a position to go forward without a complete agreement with Schenley either to liquidate or to cancel.

To summarize, on the receipt of knowledge that the purchaser of the glucose in question was Schenley, we were able to eliminate the requirement for a cash deposit and were able to complete arrangements for the purchase of 1135 tons on a delivery schedule outlined in our N. L. T. of May 22nd which Mr. Whipple must have relayed to Mr. Donnelly who acknowledged and confirmed Schenley's acceptance of our offer, including in his acknowledgment the schedule of shipments which is the same schedule we outlined in our N. L. T. of the night before.

Therefore, if it were to be a question of whether or not we purchased before Schenley confirmed (and this we did not do until we knew that Schenley was the purchaser) the offsetting question seems to be that the information we outlined in our N. L. T. of

Defendant's Exhibit No. R-1—(Continued)

May 22nd had definitely to be relayed by Mr. Whipple to Mr. Donnelly or he would not have been in a position to acknowledge and confirm the purchases and to further oueline the shipping schedules which were for the first time mentioned in our N. L. T. of May 22nd.

So, it would seem that we either purchased for account of Schenley or Schenley's representative completed an acceptance of our offer—it does not seem possible that both actions can be contended.

Assuming for the sake of this memorandum, that Schenley admits either legal or moral responsibility, then the joint recommendation of Messrs. Goytia, Dichter and the writer is that we liquidate the contracts to eliminate both the cancellation cost and any possible reflection on either Schenley or Engraw for not fulfilling the contract, in addition to which it is our belief that the liquidation can in all probability be arranged without loss to any one.

Messrs. Goytia, Dichter and Berger feel that if an allowance for Whipple were made to the extent of U\$S 5.000.—plus U\$S 500.—cost, this would be entirely satisfactory to Whipple.

To further summarize, the cable which Messrs. Dichter and Berger sent to Mr. Metcalf under date of July 8th and added to it our suggested settlement for Whipple, the summarization would be as follows:

Local cost of cancellation as out-

lined in the telegram.....U\$S 45.000.—

Defendant's Exhibit No. R-1—(Continued)

Whipple's commission and expense allowance “ 5.500.—

Total cost if cancellation is carried out “ 50.000.—

Defendant's Exhibit No. R-1—(Continued)

If the recommended liquidation is carried out immediately, the need for payment of the cancellation fee is eliminated which reduces the cost by.....U\$S 30.000.—

Net cost assuming that the contracts cannot be liquidated at better than 1.20.....U\$S 20.500.—

In view of the fact that the government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 1.23/1.25 but we already have information from our broker of a large offer pending from the United States at 1.31 just as soon as export licenses are granted.

So, if it were not for this delay in the issuance of the export permits, I believe we could continue liquidation if we had nothing more than the 20% letter of credit pledged to meet the contract requirement with the main supplier.

It is estimated that the export licenses should be coming through shortly and under the circumstances we cannot help but feel that the major portion, if not all of the U\$S 20.500.— shown above as the net

Defendant's Exhibit No. R-1—(Continued)

cost of liquidation will disappear as contracts are liquidated between now and the end of the contract period which is December 31, 1946.

Accordingly, we are most hopeful that Mr. Metcalf will agree to the suggested program of liquidation and will therefore arrange to have the letter of credit deposited and authorize us to proceed with the liquidating taking such steps as may be necessary to carry it through successfully in accordance with the program already outlined by Messrs. Goytia, Dichter and Berger.

CIA. ENGRAW COMERCIAL E
INDUSTRIAL S. A.

/s/ G. FRED BERGER,
President.

GFB:MBF

Mr. Bronson: Does your Honor wish me to step down in case counsel has any objection to any of the questions or answers in that deposition?

The Court: You may indicate them now. You are not going to read them.

Mr. L. B. Stanton: I am not prepared at this time to make objections on them.

The Court: You will have to. I am sorry. I can't have one rule for them and another for the other side. You stated you insisted that they have the depositions. It works both ways. You yourself said that they had plenty of time. I am not going to stop now. You did not want me to stop for them. I would not have stopped, anyway.

Mr. L. B. Stanton: All right, your Honor.

The Court: If you do not make them now they are waived.

Mr. L. B. Stanton: All right; we will waive them.

The Court: All right.

Mr. Bronson: I next offer the deposition of Charles W. Metcalf in evidence. That offer is made, if your Honor please, without prejudice to our objection originally made to evidence dealing with activities of any of these parties after June 7th, the date of notice from Schenley to Whipple that they were not going to go through with the transaction. It is to meet, in other words, evidence that was adduced after your Honor's ruling.

The Court: There is no waiver under our rules of an objection merely because you join issue with it and after the court has overruled you, you offer contradictory testimony. That is never done.

Mr. Bronson: I mean the stipulation, then.

The Court: That is all right. When we were governed by the conformative statute some very bad rules developed such as the effect of both joining in a motion for a directed verdict or a motion for a nonsuit and the failure to present findings, et cetera. They were all brushed aside by the New Rules, so now you can make any motion, whether it is consistent with your position or not. You can make any motion you want addressed to any portion of the plaintiff's testimony or to the whole case, and after you have been overruled you can proceed to defend the case without anybody pulling against you

the proposition that you should have rested on your objection.

I do not know how those old-fashioned ideas crept into Federal procedure, but since 1938 they have all swept aside.

Mr. Bronson: I am not growing up as fast as your Honor apparently.

The Court: Ordinarily, you know, procedure has been my hobby. I probably have written more than anybody on the Pacific Coast who is not a professional writer on the subject of California procedure and, since the New Rules have been enacted, on the Federal Procedure. I have lived with it. I taught it for 10 years in Loyola Law School here. So I probably keep track of the vagaries of our procedure more than anyone whose interest is that of a student. Off the record:

(Brief comment off the record.)

All right; you can offer all the evidence with the understanding that you are not waiving any of the points as to which the evidence is directed. You are merely protecting yourself by offering your side of the transaction.

Mr. Bronson: Very well, your Honor.

The Court: So that the court, in case it finds that my ruling was incorrect, would have your version, too.

The Clerk: The deposition of Charles W. Metcalf is marked Defendant's Exhibit S in evidence.

(Defendant's Exhibit S reads in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT S

In the District Court of the United States for the
Southern District of California

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a corporation

Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION,

a corporation

Defendant

Depositions of Charles W. Metcalf and Emanuel R. Dichter, called in behalf of the Plaintiff pursuant to Notice under Rule 30 taken before James B. Kilsheimer, Jr., a Notary Public, at his office, No. 10 East 40th Street, City, County and State of New York, on Wednesday, October 8, 1947, at 10:30 o'clock in the forenoon pursuant to Notice to be filed under Rule 30.

Appearances:

STANTON & STANTON, ESQS.

740 South Broadway

Suite 1004-09

Los Angeles 14, California

Attorneys for Plaintiff

By: HARRY S. MESIROV, ESQ.,

of Counsel

Plaintiff's Exhibit S—(Continued)
BRONSON, BRONSON & McKINNON,
ESQS.

1500 Mills Tower,
220 Bush Street,
San Francisco 4, Calif.

Attorneys for Defendant [610]

By: CHARLES PICKETT, ESQ.
CHADBOURNE, WALLACE, PARKE
& WHITESIDE, ESQS.,
of Counsel.

CHARLES W. METCALF,

Witness

EMANUEL R. DICHTER,

Witness

It Is Stipulated by and between plaintiff and defendant, by the counsel herein appearing, that the original depositions of the witness being examined may remain in the hands of James B. Kilsheimer, Jr., Esq., a Notary, at his office at 10 East 40th Street, New York City, for review and signature by the witnesses and for completion of their notary certificate, and that if the said depositions, together with such corrections as the witness may desire to make, are not signed by the time of trial, it may be used by either side with the same force and effect as though they had been signed, and all formalities complied with.

It Is Further Stipulated that in case a witness refuses to answer a question, it shall not be neces-

Plaintiff's Exhibit S—(Continued)

sary for the Notary to repeat such question and to obtain the witness's refusal to answer.

Mr. Mesirov: I want to offer in evidence a notice of Proof of Service as Plaintiff's Exhibit IN.

(Paper referred to received and marked.

“Plaintiff's Exhibit 1N in Evidence, October 8, 1947.) [611]

CHARLES W. METCALF,

residing at 330 Park Avenue, New York, N. Y., called in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Mesirov:

Q. Mr. Metcalf, will you give us your full name?

A. Charles W. Metcalf.

Q. Where do you reside?

A. 330 Park Avenue, New York City.

Q. And have you a business address?

A. Yes, 1780 Broadway.

Q. What is your occupation now?

A. I am a business consultant.

Q. You are not now employed by Schenley Distillers Corporation? A. I am not.

Mr. Mesirov: For the sake of brevity, I am going to refer to the plaintiff as “Engraw,” you know who they are, and the defendant as “Schenley,” if you don't mind.

Mr. Pickett: All right.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. (By Mr. Mesirov): Were you ever employed with Schenley?

A. As a consultant, yes, sir.

Q. During what period?

A. Roughly, for fifteen months from October 15, 1945.

Q. Fifteen months from October, 1945, which would carry you into when? [612]

A. 1947, I believe. I guess it was longer. I think it was longer than fifteen months. It was probably near October to October—near sixteen to seventeen months.

Q. And what were your duties as consultant? It was a full time position, was it not?

A. Yes, sir.

Q. What were your duties?

A. Well, I was assigned to study purchasing procedure, and purchasing operations, and such other things as Mr. Rosensteel and his organization asked me to do.

Q. Are you familiar with the transactions involving negotiations for the purchase of Glucose by Schenley from Engraw through Mr. Whipple?

A. I did not participate in those negotiations, and what I know about them I got from the people that did and from correspondence.

Q. When did you first learn about this purchase?

Mr. Pickett: I am going to object to the form of the question, Mr. Mesirov, insofar as it relates

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

to this purchase as it is the position of the defendant that there was no purchase. May I suggest that you reword the question to say alleged purchase or something of that sort?

Mr. Mesirov: I don't like the word "alleged" either. I am not trying to indirectly get a statement from this witness that it was a purchase. I will rephrase the question. Please read the question. [613]

(Last question read back.)

Q. (By Mr. Mesirov:) When, and from whom, did you first learn about the negotiations which culminated in a letter signed by Mr. Donnelly on behalf of the Schenley Corporation?

Mr. Pickett: I am going to object to that question, also, Mr. Mesirov, because of the conclusion in the words 'culminated in a letter signed by Mr. Donnelly on behalf of the Schenley Corporation.' I believe the easiest way to handle it would be to refer to the letter which is an exhibit to the Complaint, as I understand it, with which, I presume, the witness must have become familiar.

Q. (By Mr. Mesirov): When did you first, and from whom, did you learn about the transaction involving the Glucose which is the subject of this suit?

A. I first learned about this matter from the General Traffic Manager of the Schenley Corporation, Mr. Gusky, who asked me if a purchase had

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

been made, and if he was to arrange for the steamship space—shipping space.

Q. What was your reply to that?

A. I didn't know anything about it; that I would try and find out.

Q. Did you speak to anyone in the Schenley organization with reference to that inquiry? [614]

A. Yes, quite naturally.

Q. To whom? A. I can't recall——

Q. And what did you say?

A. (Cont'd) ——whether I asked Mr. Keefer, who was on the coast at the time, or someone in the Purchasing Department in Cincinnati.

Q. What was Mr. Keefer's position in the corporation?

A. He was the vice president of Schenley in charge of production and the purchasing responsibilities for the corporation headed up to him.

Q. Can you give us the substance of your conversation with Mr. Keefer?

Mr. Pickett: I don't want to suggest anything, but I thought that the testimony was that he does not recall whether he had spoken to Mr. Keefer or someone else. Was that what you said?

Mr. Mesirov: That's right.

The Witness: If you asked me who it was I first spoke to, I can't answer the question because I don't remember.

Q. (By Mr. Mesirov): Did you ever speak to Mr. Keefer? A. Oh, yes. [615]

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Will you give us the substance of your conversation with Mr. Keefer relating to this transaction?

A. To the best of my knowledge, when I asked—when I did talk to Mr. Keefer about it, he told me that these brokers on the coast had offered Glucose to Schenley through Donnelly and that a quantity had been arranged for subject, of course, to certain conditions such as the specifications and the letter of credit, and so forth.

Q. What did you next do with respect to it?

A. Well, naturally, I tried to develop whether there was a real need for this merchandise or not since it was of an extremely high price.

Q. And what did you do next after the so-called development?

A. Well, of course, you know I had no authority; I was a consultant. My advice was not to conclude the purchase.

Q. What led you to assume that there was no purchase?

A. Well, the letter of credit had not been opened, and to the best of my memory, the specifications hadn't been approved.

Q. What was your next contact with reference to this transaction and with whom?

A. Will you repeat that question? [616]

Q. What was your next contact with reference to this transaction, meaning this Glucose, the sub-

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

ject of this suit, and with whom was that contact made?

A. Well, I continued to discuss this matter back and forth with Kever.

Q. Leading to what?

A. Leading to the fact that the merchandise—it was questionable whether the merchandise was actually needed or not, and to continue to advise not to conclude the purchase.

Q. What was your advice to him?

A. That's right.

Q. And, by the way, when was it that you were first asked about this Glucose?

A. That was your question number one?

Q. Yes. A. Which I answered.

Q. Did you give me the date?

A. No, I can't. I wouldn't attempt to.

Q. Have you any dates in your mind as to——

A. (Interposing) Not a single date.

Q. (Cont'g) ——any of these conferences or communications? A. No, sir, I would not.

Q. Have you anything in writing bearing on the [617] subject?

A. Personally, no, because I left all my files with Schenley when I terminated my——

Q. And, personally, you have no memorandum of any sort with reference to your activities or your actions in this matter? A. That is true.

Q. Mr. Metcalf, did you ever see a copy of the letter dated May 23, 1946, addressed to Harold A.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Whipple Company and signed 'Schenley Distillers Corporation, J. B. Donnelly,' in which Mr. Donnelly first acknowledged an offer of Engraw and then added a postscript in which he acknowledged and accepted the offer of Engraw for eleven hundred and thirty-five tons of Glucose?

Mr. Pickett: I am going to object to the form of the question solely insofar as it purports to state the effect of the letter. I have no objection, sir, if you show him a copy.

Mr. Mesirov: I am not asking the effect; I am quoting it. Did you read it?

Mr. Pickett: I have seen the letter. I have no objection to your asking him if he ever saw a copy of the letter.

Mr. Mesirov: Well, I am merely discussing the latter. [618]

Q. (By Mr. Mesirov): Will you answer that question? (Handing paper to witness.)

A. I have seen a copy of that letter. I would like to read it again, it has been several months. (Reading) There is something in this letter here—yes, I have seen this letter. I had seen a copy of it.

Q. Did you see that copy of the letter before you concluded, as you said, or before you told him that the purchase had not been completed?

A. No, I didn't see the letter until some time after the first conversations regarding this had taken place. Mr. Donnelly is on the Pacific coast.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. And did anybody tell you that the purchase had not been completed? A. Had what?

Q. That the purchase had not been completed?

A. Well, you see—no, they did not. I mean, having had a great deal of experience in purchasing matters, the purchase had not been completed until, in my judgment, until all of the conditions have been met, and the letter of credit and the specifications had not been decided upon.

Q. But isn't it a fact that the specifications are stated in this letter? (Handing to witness.) [619]

Mr. Pickett: I am going to object to any question which would ask this witness to characterize what the letter does or does not state. The letter speaks for itself, sir.

Q. (By Mr. Mesirov): After your advice, as you say, which you gave to Mr. whom? Mr. Keefer?

A. Mr. Keefer.

Q. —not to go on with this purchase, did you do anything further in the matter?

A. Well, you got to be more specific. I can't answer a question as broad as that.

Q. Did you have any conversations with Whipple or any representatives of Engraw on the subject?

A. I discussed the matter with Mr. Heymsfeld, and I also discussed the matter, I believe, over the phone with—possibly with Mr. Whipple and with Mr. Stanton. Just the chronological events, I can't say.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. I show you a copy of a cable dated June 12, 1946, addressed to Engraw and signed 'Metcalf Distillers,' and ask you whether you sent that cable. (Handing to witness.)

A. I sent that cable.

Q. The cable reads as follows: "Reply to your cable our negotiations had been carried on with Whipple [620] Los Angeles who has been kept fully informed of our position. Regret exceedingly confused situation which has developed and suggest you advise me Schenley New York of extent of your uncancellable commitments. Also telephoned Whipple today." Did you receive any instructions from anyone in Schenley to send this cable, or did you send it of your own volition?

A. I can't recall specifically the exact circumstances.

Q. Did you subsequent to the sending of this cable have a telephone conversation with Whipple as you suggested you intended to have?

A. That's right.

Q. To whom did you speak? To Mr. Whipple, or to Mr. Stanton?

A. I think I talked to both of them in the course of a few days.

Q. You mean, there were two telephone calls?

A. I think there were even more than two.

Q. And what did you tell Whipple?

A. I can't recall, of course, the exact conversation, but I tried to develope how a commitment

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

could have been carried on in Argentine, material bought by an experienced export house before the irrevocable letter of credit had been—had been opened and the formal [621] order had been issued, and that was part of the conversation that I had with him.

Q. And didn't Mr. Whipple tell you that it was because of Schenley's reputation that this order was accepted and carried out?

A. Export business isn't done on a reputation.

Q. Don't you know that export business cannot be done if they had to wait for interoffice communications between various cities in the United States pending the purchase by the person offering the Glucose?

A. The guts of an export contract is a letter of credit, and I have never known an export—an exporter to make a commitment before the letter of credit, or the order—the formal order had been issued.

Q. Notwithstanding the fact that a commodity like Glucose has a fluctuating market price?

Mr. Pickett: Mr. Mesirov, I don't want to in any way impede you from getting the facts, but it seems to me we are now engaged in a series of arguments between the attorney and the witness. We had started by inquiring as to a conversation between Whipple and this witness, and I think we have gone pretty far from that.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Mr. Mesirov: Well, Mr. Pickett, I think he went pretty far in saying what opinion he expressed, and I am [622] merely testing his opinion.

Mr. Pickett: Well, sir, what difference does it make what his opinion was? If it was right, it was right. If it was wrong, it was wrong.

Mr. Mesirov: I am asking this witness as to his experience. He said his experience was such and such. I asked him whether it isn't true that this is a commodity where the market fluctuates and, therefore, a seller could not wait for these transactions if they——

Mr. Pickett: (Interposing) Mr. Mesirov, it seems to me we are going very far afield, but if you want to, go ahead.

Mr. Mesirov: Let him answer.

The Witness: That is a risk that the buyer has to take; that the seller never should take. If he can't conform with the terms of sale, then there is no deal until your letter of credit has been opened. It is my experience I am only speaking of.

Q. (By Mr. Mesirov): Now, do you remember the substance of your conversation with Mr. Stanton just about that time?

A. I think I asked Mr. Stanton to confirm what the situation was out there, and since I had talked to Mr. Whipple, and I think that I told him that we were desirous of not completing the contract.

Q. And what? Is that all you told him?

A. Well, that was the substance of it.

Plaintiff's Exhibit S—(Continued)
(Deposition of Charles W. Metcalf.)

Q. Didn't you tell Mr. Stanton that Schenley would be responsible for any loss that would occur and for Engraw—

A. I had no authority to make that statement.

Mr. Pickett: The question, sir, was whether you told it to him. That can be answered yes or no. (To Mr. Mesirov) I am sorry for the interruption, but I would like to get responsive answers to the questions.

Mr. Mesirov: Please read the question.

(Last question read back.)

Q. By Mr. Mesirov, (Cont'd): —and for Engraw to do whatever they think best to minimize such loss? A. No.

Q. You did not. Was there any conversation with reference to the fifty tons?

A. Yes, I can recall vaguely that that was—that I was told that fifty tons was—had already been purchased and was ready for shipment, although it is not clear in my mind whether or not the export license had ever been obtained. Somewhere, vaguely, I am under the impression that there was no export license.

Q. Did you tell him that Schenley would pay for at least the fifty tons? [624]

Mr. Pickett: Is this Mr. Stanton, sir?

Mr. Mesirov: Yes, I am still talking about the conversation with Stanton.

A. I can't recall.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Didn't you tell Stanton that you would like Engraw to say, "We are going to cancel this contract, and it is going to cost you so much money"?

A. Will you repeat that question?

(Last question read back.)

The Witness: Does that require a yes or no?

Mr. Mesirov: You can say yes or no, and if you want to explain, you can add whatever you want to.

The Witness: Well, my answer to the question is no, but—we had—I mean, we had a conversation over the telephone regarding this, and I may have asked, not told, what certain situations were.

Q. (By Mr. Mesirov): You asked what?

A. What certain situations were. I wasn't in the position, you know, to do any telling.

Q. You mean you were in no position to conclude any arrangement with Engraw with regard to the cancellation?

A. That's right. I mean I was in the capacity of a consultant, and I was no doubt developing what the situation was as far as Stanton and his clients were concerned [625] and trying to piece together how Schenley fitted into the picture.

Q. By that, what do you mean? By "Schenley fitted into the picture?"

A. Well, what measures could be taken to—in this situation.

Q. Measures taken by whom?

A. By both parties.

Plaintiff's Exhibit S—(Continued)
(Deposition of Charles W. Metcalf.)

Q. Did anyone of Schenley tell you that there was no contract for the purchase of this Glucose?

A. No.

Q. Isn't it a fact that you were told that there was a contract, and you were asked as to the method of disposing of the Glucose or the contracts so as to minimize the loss to Schenley?

A. Well, your use of the word 'contract' does not conform with my experience. A letter is not a contract, sir, and——

Q. Pardon me. I have not asked you that.

A. I understood that was the question.

Q. I asked you whether you were told by Schenley that they had——

A. (Interposing) No, I took the initiative——

Q. (Cont'd) ——consulted you about that subject. A. ——on this Glucose matter. [626]

Q. By 'initiative' do you mean that you told Schenley that they had no contract—no completed contract?

A. No, sir, I didn't tell them that.

Q. Now I ask you again whether Schenley told you that there was a binding contract and asked you to see what could be done in the way of cancellation with the least possible expense.

A. The answer is no.

Q. Did they tell you that there was no completed contract? And that they were not bound by anything that Mr. Donnelly had given?

A. No, they didn't do that.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. They didn't do that either? A. No.

Q. Well, tell us why you were continuing your interest in this transaction if so far as you understood there was no purchase—no completed purchase?

A. Well, I had satisfied myself that this Glucose was not needed and that inasmuch as in my judgment that was the case, I recommended, and continued to recommend that we not conclude the arrangement which was to have signed the order and opened the letter of credit.

Q. And why did you continue your communications with Engraw after you had come to that conclusion? [627]

A. To try and find out what the real situation was.

Q. In what respect?

A. Whether or not a commitment had been made for the materials down there. Whether—what the situation was regarding export licenses and so forth.

Q. Did you or did you not find that a commitment had been made?

A. I was told that a commitment had been made.

Q. Having been informed that a commitment had been made, how did that affect your subsequent actions in the matter?

A. When I finally came to the conclusion that a commitment had been made, then it was a matter

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

for Schenley's legal department to handle and not for me to handle.

Q. In other words, the information as to commitment was——

A. (Interposing) I mean now the commitment on the part of Engraw for Glucose.

Q. Yes, so I understood. After you received that information, you felt that you had completed your investigation of the matter.

A. I felt that I had gone as far as—as I was justified in going, and then it became a legal matter for the legal department.

Q. Had you been authorized to negotiate a cancellation [628] of these contracts by Engraw with the people to whom they were committed?

A. Not definitely authorized, but I did try to find out what the measure of cost would be.

Q. You know, of course, Mr. Dichter, who is here today? A. Yes, sir.

Q. Did you communicate with Mr. Dichter with reference to this transaction? A. I did.

Q. And what did you tell him to do?

A. I told him to proceed from where he was—I think it was Rio—to Buenos Aires to find out what the situation was regarding the Glucose market in general, and to also see the principals to determine to his satisfaction whether or not a commitment had been made.

Q. By Engraw?

A. By Engraw for the Glucose.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. For the Glucose. And he reported to you the result of his investigation? A. He did.

Q. To what effect?

A. That a commitment had been made by Engrew for the materials; that the market at that time was slightly higher than the price that had been paid for the material. [629]

Q. After that report, what did you tell him to do?

A. I told him to come back, but there were some other conversations in between.

Q. Come back where?

A. Come back to New York, or back to Brazil, and then to New York.

Q. Did you tell him to do anything further with reference to the Glucose situation?

A. Not that I recall.

Q. Was his report over the telephone or by a letter?

A. He reported over the phone, and, I think, by cable, too.

Q. Is it your recollection that you did receive a cabled report from Dichter?

A. No, I wouldn't say that, but I did receive a report over the telephone.

Q. Did you make a memorandum of that—a written memorandum?

A. No, to the best of my knowledge, I did not.

Q. You did not. After he reported that a commitment had been made, and that the market was

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

strong, or a little higher—I used your words—a little higher than the contract price, did you give him any further [630] instructions in connection with the Glucose?

A. I don't think you have this thing very well in mind. It was a recommendation——

Mr. Mesirov: I was not there.

The Witness: I see.

Mr. Pickett: May I make this suggestion, Mr. Mesirov? Would it be agreeable to you if you asked Mr. Metcalf to tell what went on between him and Dichter—everything that was said?

Mr. Mesirov: That is what I am trying to get.

The Witness: I can tell you that, if you want me to?

Mr. Mesirov: I didn't ask for a lot of conversation, but I asked him whether he gave any further instructions.

The Witness: There is one conversation that I recall very clearly, and I think Mr. Berger was on the telephone, on an extension, with Mr. Dichter, and Mr. Dichter did report that the commitment had been made; that the market was fair, and there was a joint suggestion that Schenley conclude this contract by opening the letter of credit for at least part of the amount, and Engraw would liquidate that material for the account of Schenley.

Q. (By Mr. Mesirov): I show you a copy of a cable addressed to you at Schenley Distillers, New York, dated July 8, 1946, signed 'Engraw Dichter

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Berger' reading as follows: "Cancellation here would cost \$45,000. Stop. However, [631] opening of letter of credit would at once eliminate penalty to extent of \$30,000. and would provide necessary time for orderly liquidation of contract period which is for balance 1946. Stop. Also, sale over such extended period should further reduce probable loss, if any, to nominal amount. Therefore, we suggest we act as your agents to liquidate using our judgment as to manner of liquidation having in mind reduction of loss to minimum or entirely. Stop. If agreeable, please advise so we can inform contractors and open letter of credit through First Boston. These calculations don't cover Whipple. Will you deal with him directly? Envwraw Dichter Berger."

Do you recall receiving this paper? (Handing to witness.) A. Yes.

Q. Now, Mr. Metcalf, I will go back to my original inquiry. What instructions did you give Mr. Dichter following his first report to you which led to the sending of this telegram or this cable?

Mr. Pickett: I am going to object to the form of that question insofar as it embodies a conclusion "which led to the sending of this telegram." I have no objection to the balance of it.

Mr. Mesirov: Very well.

Q. (By Mr. Mesirov): I now again ask you what instructions you gave [632] Mr. Dichter after you received his first report, or between the time

Plaintiff's Exhibit S—(Continued)
(Deposition of Charles W. Metcalf.)

you received his first report and this cable?

A. Well, I think that Mr. Dichter reported to me over the telephone what the situation was. He also went on, on his own initiative, as I recall, to develop a solution to this problem, and I think this cable was the result of conversations between Mr. Dichter and Engraw after that conversation. I certainly did not instruct Dichter to make any settlement, or make any arrangements. He was down there to find out what the situation was and explore the matter thoroughly.

Q. I understood you to say that all that you had instructed Mr. Dichter to do was to find out the market on Glucose and whether or not Engraw had actually committed themselves for the obtaining of the entire quantity of Glucose. Is that correct? A. Yes, he reported on that situation.

Q. That is not the answer. I asked you whether that was the only instruction that you had given him in connection with this matter or in connection with his trip to Buenos Aires.

A. Well, those were the instructions.

Q. And he reported—— A. That's right.

Q. ——as you stated before.

A. That's right. [633]

Q. And do you mean to tell me that entirely on his own initiative he joined Engraw in figuring out a plan of liquidation on account of Schenley without having had any instructions, without having

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

had previous knowledge, except such as he might have obtained from Engraw?

A. I might have told Mr. Dichter over the telephone to develop what the measure of loss would be to Engraw, but they were not instructions.

Q. What distinction do you draw between instructions and telling him?

A. When you instruct a person, that is what they are to do. When you ask him to develop something in the sort of an exploratory way, that is the difference I put on the thing.

Q. Mr. Metcalf, I show you five typewritten pages designated as interoffice communication from Mr. G. Fred Berger to Mr. E. R. Dichter, subject: Glucose Contracts; and ask you whether you have ever seen this memorandum. (Handing to witness.)

A. Yes, I have.

Q. Where?

A. In the office of the Schenley Corporation.

Q. Was that memorandum brought to you by Mr. Dichter? A. I can't recall. [634]

Q. But the original was delivered to Schenley?

A. Whether it was sent by mail or delivered, I can't recall that.

Q. After receiving and reading this memorandum, did you do anything further in connection with it? A. No, not that I recall.

Q. Isn't it a fact that this memorandum was in the nature of an additional report handed to you by Mr. Dichter, or sent to you by Mr. Dichter?

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

A. Well, since it originated from Mr. Berger, as well as Mr. Dichter, I didn't necessarily consider it as in the form of a report. It was more in the form of a suggestion.

Q. Going back to the cable that I read to you signed 'Engraw Dichter Berger,' under date of July 8, 1946, did you have a telephone conversation jointly with Mr. Dichter and Mr. Berger in which you stated that you were satisfied to leave the question of liquidation or cancellation in their hands together with Dr. Goytia, who then represented Schenley in Argentina?

Mr. Pickett: I am going to object to so much of that statement which characterizes as whom Dr. Goytia represented.

Mr. Mesirov: We will strike out whom he represented.

The Witness: The answer is no. [635]

Q. (By Mr. Mesirov): You did not?

A. No, I had no authority to, and if I had, the thing would probably have been liquidated in accordance with——

Q. In accordance with what?

A. With their judgment, because that was what they asked us to do, to rely on their judgment to liquidate this thing.

Q. And did you refuse to rely on their judgment to do so?

A. I had no authority to say yes or no, but I certainly would not have done it.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Mr. Mesirov: Off the record.

(Discussion off the record.)

Q. (By Mr. Mesirov): You are positive that whether acting on your own initiative, or under instructions from officers of Schenley, that you did not say to either Engraw or Dichter or Dr. Goytia, all, to go ahead and try to arrange for a cancellation or liquidation of the contracts between Engraw and the producers or the people from whom they obtained it?

A. The answer to that is no.

Q. One other question: Did Schenley have an agent in Buenos Aires or any other place in Argentina? [636]

A. I can't answer that; I don't know.

Mr. Mesirov: That is all.

Cross-Examination

By Mr. Pickett:

Q. Mr. Metcalf, in answer to certain questions, you were talking about your experience in this field of purchasing products. What experience did you have prior to these conversations about which you have testified?

A. Well, the most recent experience was the purchase of several thousand dollars of Manioc meal from certain houses.

Mr. Mesirov: I object to that as highly irrelevant.

Mr. Pickett: Sir, my question was confined to

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

experience prior to the time that he had the conversations about which he testified.

Mr. Mesirov: So, you see, his answer, in my opinion, is not responsive.

Q. (By Mr. Pickett): Do you understand my question, sir? Will you tell us what your experience in this field had been prior to the time you first learned about this Glucose transaction?

A. Well, I have been in purchasing for the last twenty-five years, and while it is true that it did not involve the purchase of materials from—that had to be imported continuously, nevertheless, throughout that [637] experience there had been purchases going back to the Twenty's of sugar from Java and various other countries, and gelatin from Holland, and so on and so forth up to the Manioc meal for Schenley.

Q. I believe your attention was called to a telephone conversation following a document which is dated June 11, 1946. That was a conversation which you had with Mr. Whipple. Do you remember the substance of that conversation? You gave us only part of it on your direct examination.

A. Will you read back the part that I gave so that I can fill in if there was anything——

Mr. Mesirov: Off the record.

(Discussion off the record.)

Q (By Mr. Pickett): Suppose we say in the early part of June, 1946, you had a telephone conversation with Mr. Whipple. A. Yes?

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Now, as best you can recollect, what was the substance of that conversation?

A. Well, I tried to develop what the real situation was in relation to this Glucose matter to find out all I could about it so that we could form a conclusion as to what to do.

Q. As best as you can recall, what is the substance of what Mr. Whipple told you? [638]

A. He told me that fifty tons—that he was definite that fifty tons had been bought; that he wasn't positive about the rest of the materials; that he expected that—I think it was Whipple or Stanton—that they sold this material, and that they would develop whether or not all of the commitments had been made.

Q. Who had sold this material?

A. He had, for the account of Engraw to Schenley.

Q. You inquired of Mr. Whipple whether Engraw had purchased the amount of Glucose referred to in Mr. Donnelly's letter?

A. That's right.

Q. And what did Mr. Whipple tell you?

A. He told me he was sure fifty tons had been purchased because it was for rather prompt shipment, but the balance he wasn't sure, but that he would develop it.

Q. Did you discuss with Mr. Whipple at that time the letter of credit?

A. There was no discussion regarding the letter

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

of credit. I may have told him a letter of credit had not been opened, which I knew.

Mr. Pickett: Will you read the answer?

(Last answer read back.)

Q. (By Mr. Pickett): Did you inquire of Mr. Whipple why Engraw had [639] purchased the fifty tons, about which you have already testified, prior to the opening of the letter of credit?

A. Yes.

Q. What did he say?

A. As I recall, he said that it was—a prompt shipment was required, and the material was available, and it was bought for prompt shipment.

Q. Did you ask him why that had been done prior to the issuance of the letter of credit?

Mr. Mesirov: I object to your form of the question. You are leading the witness.

Mr. Pickett: This is a cross-examination, sir.

Mr. Mesirov: Well, I still object to it.

Mr. Pickett: Will you read the last question?

(Last question read back.)

The Witness: Yes, I did.

Q. (By Mr. Pickett): What did Mr. Whipple say? A. I don't recall.

Q. Did you ask Mr. Whipple at that time anything about a sample of Glucose?

A. I can't answer that yes or no.

Q. You don't remember?

A. I don't remember, no.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Did you inquire of Mr. Whipple who had—strike [640] that—you say that you had a telephone conversation with Mr. Stanton?

A. That's right.

Q. Did you call him or did he call you?

A. I think there was more than one call. I think that he called me originally, and I think that I called him back on at least one occasion.

Q. The first telephone conversation which you had with Mr. Stanton was after your telephone conversation with Mr. Whipple? A. Yes.

Q. But you don't remember when?

A. Remember when?

Q. Yes.

A. It was within a matter of days.

Q. After Mr. Whipple had spoken to you?

A. That's right.

Q. Did Mr. Stanton say whom he represented?

A. Yes.

Q. What did he say?

A. He said he represented Mr. Whipple.

Q. Did he say he represented Engraw?

A. I don't recall.

Q. What was the substance of your telephone conversation with Mr. Stanton on that occasion?

A. Well, the subject of the contract—the so-called order—was discussed, and our previous conversations with Mr. Whipple were discussed, and he stated that he was representing Whipple, and

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

then we tried to develop what the—what damage, if any, had been incurred on this thing.

Q. What did Mr. Stanton say about that?

A. I don't recall.

Q. Did you say you had another conversation with Mr. Stanton over the telephone?

A. Yes, but the conversations were about the same subject.

Q. Did Mr. Stanton ever tell you the amount of damage which was claimed? I am talking about the telephone conversation.

A. Specifically, no.

Q. In the course of these telephone conversations with Mr. Stanton and Mr. Whipple, did you at any time ever say to either of them that Schenley had contracted to buy the Glucose, which was the subject of Mr. Donnelly's letter? A. No.

Q. After your telephone conversation with Mr. Stanton, you spoke to Mr. Dichter?

A. There was quite a lapse, I think, of time in between that, but that is the sequence of events.

Q. You had not spoke to Mr. Dichter before speaking [642] to Mr. Stanton? A. Oh, no.

Q. Or Mr. Whipple? A. No, no.

Q. By the way, during your conversations with Mr. Whipple and Mr. Stanton, was the subject of export licenses mentioned?

A. I can't recall that.

Q. After Mr. Dichter was in Buenos Aires, you had at least one telephone call with him and Mr.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Berger of Engraw jointly? A. That's right.

Q. Did you have more than one such telephone conversation? A. In a three-way hookup.

Q. Did you speak to Mr. Berger when Mr. Dichter was not on the phone?

A. No, not to the best of my knowledge.

Q. Did you speak of anyone at Engraw other than Mr. Berger? A. No.

Q. During this telephone conversation between Mr. Berger, Mr. Dichter, and yourself, was the subject of export licenses mentioned?

A. Specifically, I don't know whether they were mentioned or not, but they were in our minds.

Q. Well, do you recall whether anything was said [643] about export licenses?

A. No, it wasn't, to the best of my recollection.

Mr. Pickett: May I see that cable of July 8th, please, Mr. Mesirov?

(Handing paper to Mr. Pickett.)

Q. You were shown this cable signed 'Engraw Dichter Berger' dated July 8. In that cable you will notice a reference to "eliminate penalty to extent of \$30,000." (Handing to witness.) When you had the telephone conversation with Mr. Dichter and Mr. Berger jointly, was the subject of that penalty discussed? A. Yes.

Q. What was said by either Mr. Dichter or Mr. Berger?

A. I think that Mr. Dichter told me that this

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

contract had been registered with some agency in—the chamber of commerce.

Q. Which contract, sir?

A. This contract between Engraw and the people that they had bought the Glucose from—the suppliers—had been registered, and that to cancel that contract would involve a penalty.

Q. Was the amount of the penalty mentioned?

A. It may have been, but I don't recall.

Q. Was anything said as to what the nature of this [644] penalty was?

A. Well, it is not clear in my mind what the nature of the penalty was, but I was under the impression that it was——

Mr. Mesirov: I will object to his stating his impression.

Mr. Pickett: Don't tell us your impression, Mr. Metcalf; we don't expect you to remember exact words of conversation.

Mr. Mesirov: Off the record.

(Discussion off the record.)

The Witness: Will you ask your question again?

Q. (By Mr. Pickett): I have been asking as to what was said by either Mr. Berger or Mr. Dichter regarding this so-called penalty during that three-way conversation that you had—the substance of it.

A. I can't recall that. It was too long ago.

Redirect Examination

By Mr. Mesirov:

Q. You were asked about your experience in

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

purchases on letters of credit. Where did you gain the experience? In what country?

A. I was executive vice-president for the General Foods Corporation, the largest food company in the world, and I had charge of their buying.

Q. During what period? [645]

A. From 1925 to 1945—1927 to 1945.

Q. And where were the foods purchased?

A. I beg your pardon?

Q. Where were the foods purchased?

A. We brought coffee in from Brazil. We brought cocoa in from Brazil and Africa, and we brought tea in from India, and so on and so forth.

Q. Since you attempted to testify as an expert, let me ask you this: Where you have a large quantity—an offer of a large quantity, and you are accepting that offer with a fluctuating market such as Glucose had, would you still say that it was proper for the seller to wait until some other communications were sent, besides the acceptance and letter of credit issued?

A. This was the first business, to the best of my knowledge, that Engraw ever had done with Schenley, and it was on a commodity that isn't usually bought by Schenley, and under those circumstances, when the terms of the contract are letter of credit, I think that that is true.

Mr. Pickett: Think that what is true, sir?

The Witness: I think that it is very unusual for the exporter to make the commitment until the let-

Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

ter of credit has been opened and he has been advised of it.

Q. (By Mr. Mesirov): And is it your opinion, as an expert, that [646] notwithstanding the rapid fluctuation of the Glucose market and the fact that an offer was acknowledged and accepted by a concern so well known for its financial ability to meet contractual obligations, that the seller should still have waited?

A. I don't think the fluctuation——

Mr. Pickett: (Interposing) Just a moment, please. I am going to object to the form of that question on the ground that it assumes that an offer had been accepted. It assumes facts which have not been shown, that there were wide fluctuations in the price of Glucose. Those are my objections as to form. I think there are several objections as to substance, but under the rules they don't have to be presented.

Mr. Mesirov: Well, let me ask a supplemental question, then.

Q. (By Mr. Mesirov): Did you know the Glucose market at that time?

A. No, sir, not in the Argentine.

Q. You did not know? A. No.

Q. Then I still ask you to answer my question subject to objection.

A. I don't think the price, or the fluctuating price, has anything to do with the method of doing an import-export business. I think that it is a

Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

matter of policy, [647] and if Engraw's policy was to go ahead and make his commitment before he got his letters of credit, that was his business.

Q. Don't you know, as a matter of fact, that, for instance, in the wool industry, which involves very large amounts in the way of purchases, that sales are made without any formalities or letters of credit?

A. I know nothing about the wool business.

In the District Court of the United States for the
Southern District of California

COMPANIA ENGRAW COMMERCIAL E
INDUSTRIAL S. A., a corporation

Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION,
a corporation

Defendant.

The foregoing testimony of said Charles W. Metcalf being from pages 3 to 41 both inclusive was duly sworn and subscribed to before me by said Charles W. Metcalf this 12th day of December, 1947.

/s/ CHARLES W. METCALF

Sworn and subscribed to before me by said Charles W. Metcalf this 12th day of December, A.D. 1947.

/s/ JAMES B. KILSHEIMER, JR.

The Court: All right.

Mr. Bronson: We offer next, your Honor, the depositions taken on Commission in Buenos Aires of Doctor Mario Robiola and Doctor Eduardo Caranza.

The Court: Wait a minute, just a minute. This is really where my clerk needs help.

Mr. Bronson: While your clerk is looking that up I was going to suggest, your Honor, with regard to the volume that you hold in your hand now, that that is an exhibit in the deposition of Mr. Ditiheim. I read the thing over and in my halting Spanish I found no reference in it to the glucose market, and I think a reference to the witness' deposition will show that he put it in just to show that the Bolsa down there gets out that periodical giving quotations on what they call acciones there. That is stock, isn't it?

The Court: Yes.

Mr. Bronson: And commodities. And then it has also the balance sheets and financial sheets of various corporations. As an exercise in Spanish I went over it page by page and did not find the word "glucose" even mentioned in there.

The Court: I can't tell at the present time.

Mr. Bronson: It is going to fatten the record terribly if included. I thought counsel might agree to withdraw it [649] but apparently he does not.

The Court: Well, it is a very interesting essay. Gentlemen, I think, by just glancing at it hastily, reading a proof-reader's eye, very, very fast examination, I can't see what relevancy this has. This

is a thesis presented to the university by Eduardo Martinez Carannza, and the title of it is the theory of the occasional act in the doctrine, in theory, and in the civil code. When I look at the preface——

Mr. Bronson: I am referring to an entirely different book. I am sorry. That is a part of the deposition of one of our defendants, but there is a bulletin or journal.

The Court: Well, I have the wrong one. I will finish with this one. Maybe it will come back later on. What it deals with is the doctrine of responsibility for damages foreseen and unforeseen, just like our distinction between damages flowing from a breach of contract and that from tort. They illustrate it in the cases which say that in contract only what flows directly, and that unforeseen things or special conditions must be pleaded. So this one, he says, he deals merely with unusual situations, what the French would call *force majeure*.

Mr. Bronson: I address my remarks to the journal and ask the counsel to stipulate, if they are willing to, that in the interests of keeping the record within the [650] bounds, that it be removed as an exhibit from the deposition of Ditisheim.

Mr. L. B. Stanton: I will swap with you. You take your book out and I will take that out.

Mr. Bronson: I think that is about right. I don't like to make trades in the court room. We generally do that out of the court room.

The Court: Let me see your book. Will you locate the one wherever it may be so we will know. Let us pass that for a moment, gentlemen. When

the transcriber brings back the copy of the deposition we will try to locate it.

Mr. Bronson: I offer the deposition, first, of Dr. Mario Robiola.

Mr. L. B. Stanton: We have numerous objections to these depositions.

The Clerk: Do you wish the interrogatories marked first?

Mr. Bronson: I think, if you will follow the same procedure that you did with the others it will be agreeable.

The Court: All right.

The Clerk: Defendant's Exhibit T is the Commission to Take Depositions on Written Interrogatories plus the interrogatories, plus the cross-interrogatories; Defendant's Exhibit T in evidence.

The Court: All right. It may be received subject to [651] the same rule I laid down for the others that the plaintiff may make specific objections to answers that were given to certain interrogatories.

The Clerk: Defendant's Exhibit T-1 in evidence is the deposition of Mario Robiola. That is Defendant's Exhibit T-1 in evidence.

Mr. Bronson: Shall I proceed to make an offer of the remaining ones before the objections are heard?

Mr. L. B. Stanton: They are all the same questions.

The Court: I think if you offer them all, then we may save time, just as we did in the case of the other depositions.

Mr. Bronson: All right. I offer next the deposition of Eduardo Carranza and the preliminary papers.

The Clerk: That is Defendant's Exhibit T-2 in evidence.

The Court: That is the gentleman whose book I referred to.

Mr. Bronson: I next offer the deposition of Adolfo Magdalena.

The Court: All right.

The Clerk: The deposition of Adolfo Magdalena is Defendant's Exhibit T-3 in evidence.

(Defendant's Exhibit T set out on pages 877 to 890; Defendant's Exhibit T-1 set out on pages 891 to 904; Defendant's Exhibit T-2 set out on pages 905 to 925 and Defendant's Exhibit T-3 set out on pages 926 to 943.)

The Court: What did you say?

Mr. L. B. Stanton: I asked counsel if he is offering his treatise, likewise.

The Court: No. 7?

Mr. Rowe: Well, it goes with the deposition.

The Court: Well, gentlemen, if they bear in any way upon the subject, we have a provision in the rules which allow us to make an order to transmit the bulky exhibits direct to the higher court, and that order can be general or it can be special. We had to adopt the rule where we have maps and things like that and where we have physical exhibits, such as in patent cases, so that if you feel that they have a bearing and either of you is willing to waive whatever relevancy the documents may

have, I am just suggesting that that will be a method that can be adopted to shorten any record on appeal.

Mr. Bronson: That would answer the purpose.

The Court: In the meantime, I can direct the reporters not to copy the foreign exhibits, written in foreign languages, into any record we will refer to. It would be very difficult for them to type Spanish, anyway, because you have to have a special typewriter to write Spanish.

Mr. Bronson: Such an order is agreeable to us, your Honor.

The Court: Well, with that, you need not have any worry and I am doing it now, before the case is completed, [653] before we know what the ultimate decision is going to be. You have not completed your case yet. And I assure you, insofar as it lies in my power, I am going to assist you, under all of the rules, in order to shorten any record, within any reasonable limitation. That will be the understanding, that those books or magazines or treatises are merely referred to by a legend, that by order of Court the physical exhibits are not to be transcribed into the record.

Mr. L. B. Stanton: These depositions, your Honor, all relate, as I gather from a reading of them, to the defense:

“As A Further, Separate, Affirmative Defense” of the defendant, which states in their pleading, “the export of glucose from the Argentine Republic to any other country was strictly prohibited by the

laws of the Argentine Republic Nos. 12.591, 12.830 and Article 14 of Law No. 15.591,"——

That was changed by amendment to 12.591——

“——and regulations and orders regularly passed and made thereunder, during the period during which deliveries pursuant to the terms of said alleged contract were to be made by plaintiff at a West Coast Port of the United States of America.”

Now, in the first instance, I wish to make formal objection that the pleading is insufficient for the purposes of introducing the evidence which has been produced here. The [654] pleadings call for two laws, numbers 12.591 and 12.830, and says that by these laws the export of glucose was strictly prohibited. That in itself is an insufficient pleading. The rule on pleading is that under foreign laws, that is a question of fact and it is a question of fact which must be pleaded as a question of fact.

41 Am. Jr. 296 states:

“Where it is not otherwise provided by statute, the courts do not take judicial notice of the laws of a foreign state, and where such statutes are material to the controversy and are relied on as a basis of a right of action or as a defense, they must be set forth by the pleader so that the court may judge of their effect.” [655]

The Court: That is not the rule in the Federal Courts. He is dealing with State courts there. That is not the rule in Federal Courts, because we are specially given jurisdiction of causes between foreign corporations and citizens of the United States. Therefore, the times comes when we are called upon

to interpret, and the only rule that applies in our courts is that we do not take judicial notice of them as we do of the courts of the United States and the court where we sit but we must have proof.

Furthermore, under the modern system of pleading, you could say effectively in an answer that a contract was illegal by the laws of Argentina, regarding export because that was forbidden, and that would be sufficient, and then it would be a question of proof. Our pleading now has become what you call notice pleading.

Mr. L. B. Stanton: That is right, it is notice pleading, but, your Honor, we must have notice.

The Court: You have notice. They do not have to give you the law and describe it for you. They say it is forbidden. They say it is forbidden. You can't cite any law in the United States, any Federal or high court opinion which holds that you cannot prove a foreign law in a court; that you have to give it in detail and give the language of it; that is not the law and never has been the law.

Mr. L. B. Stanton: I don't think it is. I haven't been [656] able to find a thorough monograph on that. 134 A.L.R., at 574——

The Court: I am not going by the State laws. One of the objects of the Federal Courts is remedy for a conflict between foreign citizens. This Court has original jurisdiction of actions brought by a foreign citizen and therefore the law of that nation comes before the Court. We have jurisdiction, as I said, under 41-A, of causes arising between citizens

of foreign countries and citizens of the United States.

Mr. L. B. Stanton: We have no notice in this case here of what regulations or orders were passed.

The Court: They don't have to give you the number. It is up to them to prove. I agree with you that they cannot go by generalities. They have to refer to them so that you can identify them.

Mr. L. B. Stanton: But they have been referred to here. That is the point. That is the point in this case. They say, "and regulations and orders regularly passed and made thereunder,"—

The Court: The objection will be overruled. I say they have to prove—furthermore, one of the witnesses said they were all wrong about characterizing, someone was wrong about characterizing—I have just taken a glance at one of these—a certain thing, by a certain number and calling it the law, and [657] that it was merely a regulation.

So that when a person puts in a pleading a reference to a foreign statute, he has given you a sufficient knowledge that he pleads invalidity under that law. If he was bound to give you the exact page and number, that would delay his answer, if you were entitled to accurate information, which of course could not come from him, unless he has personal acquaintance with the law of that country.

Mr. L. B. Stanton: I have no objection to the laws—the only question I have is as to the pleading of "regulations and orders regularly passed and made thereunder,"—and that calls upon a person to

look into a whole volume of Argentine law, and we are not placed upon notice in that regard.

The Court: Well, the objection is overruled.

Before we go on, I want to straighten out the record and refer to this document, to which reference was made in the deposition which you offered. It is Exhibit A accompanying the testimony of Luis Ditisheim and it is entitled Bulletin of the Stock Exchange of Buenos Aires and it is No. 22223, Volume XLIII, of November 17, 1947, and it is a book consisting of quite a number of pages, the paging beginning on page 930 and ending at page 1068, and it will be understood that as for this exhibit the same rule would apply, that the reporters need not transcribe it, it may merely be referred to [658] as Exhibit A of the deposition and will be considered a part of it. Then it will be, in proper time, transmitted to the Courts of Appeal as an exhibit if the situation warrants. All right. I merely wanted to identify it.

All right, what is your next point?

Mr. L. B. Stanton: The next point is that the sole order on which they claim is a verbal order, that none of the parties who were making the depositions were present at the time it was made; they learned about it, they generally state, "From information which has been given me." That is one statement. Another statement says they learned it from some known man. They don't say whether he was in the Department at all or anything about it.

The other says he learned it from a colleague, to get the background of it.

It was unquestionably a law or a rule, which as the witnesses state was passed by a revolutionary government which was not acting in accordance with the constitutional system, and I am referring in this respect to the answer of the witness Robiola to the fifth interrogatory. He gives various illustrations of how this government did not act under their law at all, in violation of the constitutional law, but that simply no one was in disagreement with him. That I submit, your Honor, is not any regulation or order which was regularly passed or made under this law 12,591. It is also [659] clearly hearsay testimony of whatever that law might have been.

The Court: All right.

Mr. L. B. Stanton: There is nothing to show what the full contents of that law is. The witnesses vary among themselves in regard to what it was. None of their testimony is direct to the point as to what the law was and their testimony is based upon the fact *there* there was some verbal order. Yet, they state in so many words that on the Bolstein Bolsa orders were required to be published. That goes to the basis of the validity of the whole deposition.

The Court: Well, I think that goes to weight admissibility. We cannot apply to any foreign country with the ideas of due processes which obtain in the United States. There is no country in the world, with the exception of pre-Schussnig Austria, which had any doctrine like ours, which allows courts to invalidate laws which are not constitutional. Ours, of course, was developed, the doctrine

of judicial supremacy was developed judicially by the Supreme Court beginning with *Marberry vs. Madison*.

I take judicial notice of the fact that that principle is an American doctrine purely. It does not obtain in England. It never has obtained in England, from whom we borrow the basis of our system, and the mere fact that an ordinance is required to be in writing does not prohibit the Government either [660] legitimate or illegitimate, when *de facto* or *de jure*, from making a regulation. If that regulation was actually in effect and it was binding upon the person who entered into such a contract, that was binding on him and he cannot show any foreign country's court that he was not bound by it unless he could show that he had a remedy in the country itself where he could question that decree.

So that ultimate, if, as a matter of fact, by reason of a verbal authority, he couldn't and did not get a license, then, he cannot claim that he could have gotten it because it was unconstitutional unless he could show that he has resort, as we have in the United States, to courts to stay the hands of an administrative body. They have them. They have them in France. I don't know what the Spanish word is for them. They call them *contentieux administratif*, and that is a single proceeding whereby they can enforce administrative and governmental bodies to desist from doing something illegal. Of course, that is the essence of due process in this country, but, even in this country the Government

cannot be sued except with its own consent and the courts can only make a declaration. We have a good illustration in the famous case of Berg against Hull, where the State Department declined to issue a passport to a young woman who was born in the United States, of Swedish parents, and the parents returned to Sweden and remained there longer than two [661] years after they became naturalized, which meant that they automatically lost their citizenship. The young lady came back to this country, after she became 21 years of age, and expressed her desire to become an American citizen, which she had a right to, and then applied for a passport. The State Department did not issue a passport. She brought an action in declaratory judgment and the Supreme Court held that she had a right to the passport and made a declaration, although they said they could not issue an order.

So, assuming everything that you say correctly represents what these people testified to, that goes to the weight and the admissibility. They may be inquired into, for the reasons I have already indicated.

Mr. L. B. Stanton: Your Honor, as you very clearly stated, our pleading is a notice pleading, but, when we are notified of an order regularly passed and made and then they come up with some verbal order made on hearsay testimony, if they are relying on a hearsay order, if they are relying on a verbal order, they certainly should have pleaded it.

The Court: When you are talking about statutes and ordinances, you have to rely on those, unless

you show that it was required that all of these orders be written and published.

Mr. L. B. Stanton: That is exactly the thing the depositions do say.

The Court: Well, that the law required it——

Mr. L. B. Stanton: That is exactly what the depositions do say.

The Court: All right, but, if as a matter of fact, in fact the ruling was enforced and the man couldn't obtain it and he should have known that that was the fact, it does not make any difference whether the people who declared he did, did it legally or illegally, if he is forbidden by a government, whether it is revolutionary or not. I don't know what government you are referring to.

Mr. L. B. Stanton: That argument is all right, if it is pleaded; then we have a fact to meet, but here we have an entirely different set-up. On the set-up of this pleading, we have here a country operating under normal conditions, passing laws in a normal way. The fact on the thing, as shown in this deposition, is that it was a revolutionary government which was practically an anarchy so far as the words of the deposition are concerned. We have no notice, we have no notice on the things to meet. That is exactly the point of this argument.

The Court: Well, the objection is overruled.

Mr. L. B. Stanton: There are various laws cited in these depositions which were passed subsequent to the time of the whole question involved here and they relate back by reason of the fact that these

laws subsequently passed, that they justified the legality of the verbal order. [663]

The Court: Well, that is a question of argument, whether a Government can do that. We forget, we forget especially in the realm of Federal law that it was not until after the Supreme Court invalidated the N.L.A.R. and the Hot Oil case, that the Government established a register called the Federal Register in which they publish regularly, so that anybody can find all the rules and regulations which are published.

Furthermore, in constitutional law, it is not generally good constitutional law that a law cannot be retroactive, although the solution has been that it is. It is not the law. A lot of people confound retroactiveness with *ex post facto*. The Constitution forbids an *ex post facto* law, that is one which punishes someone for an offense which was not an offense when committed, but statutes may be retroactive and the Supreme Court had said so repeatedly. Every tax bill that we pass is made retroactive. For instance, the current tax bill on which you are going to pay for this year has not even been passed for this present year and it will be passed and when it is passed it will go back until January 1st, and the Supreme Court has repeatedly had occasion to say that and I myself have applied it to various cases. So that we cannot argue, when we are dealing with a Latin system which is patterned after the European system and based on Roman law. The Roman law did not limit the power of the State.

There are no [664] Bills of Rights in some of the Constitutions. There are some in the Constitution of France. There are some even in some of the South American Republics, but there is no constitutional doctrine that the parliament of a country not governed by a common law cannot make a retroactive statute, because that is not even good American law.

I think all of these matters are matters to argue at the time of the general argument. They don't go to the admissibility. In other words, I, in interpreting their law, have to place myself in their position and I cannot apply American illustrations to their law.

Mr. L. B. Stanton: I was certainly under the idea, until your Honor spoke, that a person had to have actual knowledge of the thing before they could give testimony in regard to it. They could not give testimony on purely a hearsay matter. This man comes along and says that he wanted——

The Court: That is merely a statement, when a man says that a certain custom obtained. Supposing this: We know that the law prescribes how to go about to get a passport. Nevertheless, if you went to get a passport, you would find all sorts of customs which obtain here, which are ordered from Washington, and which may delay you and prevent you from getting it within a certain time. You are absolutely powerless. The reason for that is that certain customs and [665] practices have developed and requirements are not inconsistent and even in

our country, the courts have held repeatedly that if you apply our rules and regulations, certain questions are answered by all and they will be respected in the courts. Now, I haven't read them all. I have merely glanced through them. Furthermore, the rule here does not apply there and the rule here isn't objectionable when you are proving it as a fact. Now, that is not hearsay. That is not hearsay. Let me give you an illustration.

When you cross the border into the United States from Mexico, they stop your car and they ask you a question, which I have said repeatedly no person has a right to ask because I do not find anything in the law on it and the question is, "Where were you born?" Now, you could decline to answer it, in which event you would be stopped at the border and you might stay there until you get a writ of habeas corpus. Now, what the laws says is this, that they have a right to inquire and have a right to be in the United States, and I have repeatedly, from the bench in San Diego, admonished the officers that they are absolutely doing something that is illegal. One of the Judges, being born in this country, merely because he had a Germanic name, the late Judge Hauser, was humiliated and stopped at the frontier over an hour by such questions. I myself, in self defense, because I was not born in this country, carry what I call [666] a charter passport and when they ask me, "Where were you born?" I do not answer the question, but I just show them my passport and a permit to cross the border.

So that what we are confronted with in this case is not the proposition of whether the order was legal under Argentine law or not. If the order was in actual effect there at the time and you could not obtain an export permit, that is a question to be considered by the Court.

Mr. L. B. Stanton: But that is an entirely different question from what is pleaded, that is an entirely different defense than what is pleaded. If we had had that defense pleaded, we would have had to meet it.

The Court: The objection is overruled. You can argue that point later on. I am not going to stop this case on the question of pleading, now, I will say that much about it. If you are taken by surprise, by these answers, before the case is submitted, if you want to ask for additional depositions, I may allow you at the proper time to take additional depositions to prove these oral matters, before you conclude the case.

Mr. Bronson: Shall we proceed, now?

The Court: Yes, go ahead.

Mr. Bronson: Mr. Donnelly, will you take the stand? [667]

JOSEPH B. DONNELLY,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bronson:

The Clerk: What is your name, please?

The Witness: Joseph B. Donnelly.

Q. (By Mr. Bronson): Mr. Donnelly, you hold a position in the defendant's company, Schenley Distilleries Corporation, do you not?

A. Yes, sir.

Q. What is it?

A. I am production manager of West Coast Operations.

Q. And there are some subsidiary companies in which you hold an officership, is that not true?

A. That is right.

Q. What company or companies?

A. Schenley Distilleries, Incorporated, Three Feathers Distilling Company, California Vineyards Association, Cresta Blanca Wine Company.

Q. Now, reference has been made to a letter signed by *by* you and dated May 23rd. In the pleadings filed by the plaintiff in this case, it is marked as Exhibit A. You have examined that letter during the course of this litigation, haven't you, and are familiar with it? [668]

A. Yes, I have.

Q. That is the letter dated May 23rd to which, under your signature, you put a postscript. You recall the letter, do you?

A. Yes, sir, I do.

(Testimony of Joseph B. Donnelly.)

Q. Now, that was addressed to Harold A. Whipple who has been on the witness stand in this case. Can you tell us approximately what day you first knew Mr. Whipple, first heard of him?

A. The first day I heard of Mr. Whipple was on either May 10th or 11th. I think it was the 10th, at which time one of our salesmen in Los Angeles handed me a memo, a slip of paper with Mr. Whipple's name on it, a telephone number, and told me that Mr. Whipple was able to secure some glucose and wanted to know whether I was interested in finding out about it.

Q. What did you do at that time?

A. I took the memo and I was unable to call Mr. Whipple that day, because I was busy and I called him the next day while I was still in Los Angeles. I told him who I was and asked him if it was true. He said yes. He told me at that time that he was able to secure glucose, that would be above the ceiling price and he assured me that it would not affect our sugar quota and that it was legal to bring it into the United States. That was all of the conversation. [669]

Q. All right. Does your company in fact use quantities of sugar, that is, use chemical stuff of that kind in any of your products?

A. Yes, I think we use it. How much I couldn't say, but we use it in our cordial manufactures back East and a small amount out here on the Coast in cordial manufacture.

(Testimony of Joseph B. Donnelly.)

Q. And at that time were there quotas applied to manufacturers using sugar?

A. There was a quota.

Q. Now, Mr. Donnelly, did you have any subsequent conversations with Mr. Whipple and if so, state when and what was said, up to the time of this letter of May 23rd?

A. Well, I left Los Angeles, went back to San Francisco, and then contacted our Eastern offices, to find out if we were interested in securing any glucose and found out that we were interested and they asked me to look into it. I called Mr. Whipple on May 14th, I am pretty sure it was the 14th, from San Francisco, told him that we were interested in Glucose and at that time he gave me some additional information. It went somewhat to the effect—he gave me the price, I think it was 22.3 cents.

Q. You are speaking of American currency?

A. I am speaking of American money, yes. And at that time he stated that he had available 1300 tons; that 300 tons was a prior commitment. So therefore, there was only 1000 [670] tons available; that he might be able to secure the extra 300; that he had samples in the United States and they had been delivered to somebody else; that he would try to get those samples back to deliver to us, but if he couldn't he would cable South America and ask them to ship us additional samples; he mentioned that it was crystal clear and he mentioned the Baume content of the glucose.

(Testimony of Joseph B. Donnelly.)

He failed to mention whether duty was included in that price. He gave me approximately shipping dates. I think it went something like 50 tons in June or July and then 100 tons for a few months and then the balance in December, if I remember rightly. I have a memo of that, but that is as far as my recollection goes. We ended the conversation, then. No other commitment was made.

A few days later——

Q. That concluded the substance of what you recall of the May 14th, if that is the correct date, conversation with Mr. Whipple?

A. That is right.

Q. You were then in San Francisco and he in Los Angeles, correct? A. That is correct.

Q. Now, did you talk to him again at any time before this letter was sent out, that has a date May 23rd and contains a postscript? [671]

A. No, I did not speak to Whipple in that interval.

Q. You had no conversation with him?

A. No conversation at all.

Q. Well, is it your testimony that the last date you conversed with Mr. Whipple was on May 14th?

A. I conversed with him on May 14th and then I believe on May 24th.

Q. May 24th? A. That is right.

Q. Now, I am using this copy of this letter. It is in evidence. It is No. 5 for the plaintiff, I will hand you Plaintiff's Exhibit 5 and you can follow

(Testimony of Joseph B. Donnelly.)

that. It bears date May 23rd and you refer to the next conversation you had as being May 24th. Do you know whether this letter dated May 23rd had been sent at the time you talked to Mr. Whipple on this third occasion?

A. The letter had not been sent.

Q. And will you state what occurred in that conversation?

A. Well, on May 24th I called Mr. Whipple because he had placed a call for me and I wasn't in, so it was his origination of the call, but I called him and he advised me, then, that he could secure 1,135 tons, it shows in the letter here, and a shipping schedule, and I acknowledged that and told him that I had already written him a letter [672] on a previous 600 tons and stated that I would write him another letter on the 1,135.

After I got through talking to him, I found out that the letter had not been transcribed as yet, it was still in the secretary's notebook, and so I added this postscript to my May 23rd letter.

Q. At the time that you had dictated this letter of May 23rd down to but not including the postscript, had you received any communication with regard to glucose coming from Mr. Whipple through Mr. Baglin? A. Yes, sir, I had.

Q. And Mr. Baglin is what relationship to you in the Schenley organization?

A. Mr. Baglin is my assistant.

Q. And what did you learn from Mr. Baglin

(Testimony of Joseph B. Donnelly.)

as to the subject matter of the opening portion of this letter?

Mr. L. B. Stanton: That is hearsay. Mr. Baglin is here in court.

The Court: Well, unless it was communicated to Whipple at the time of the discussion, I don't think it would be material.

Mr. Bronson: Now, the question is as to what information he had from Mr. Baglin bearing on the opening portion of the letter.

Mr. L. B. Stanton: It is hearsay and I object to it [673] on that ground.

Mr. Bronson: Well, all right, if you insist on the objection, it may be good. I am not so sure of it.

The Court: Well, I think the objection is good because it calls for an interpretation of the letter. If the letter is ambiguous and it refers to something else or refers to this information, then, all right.

Mr. Bronson: I will withdraw it, your Honor.

Q. Will you state, if you know, how much glucose had been offered by Mr. Whipple up until the time of your conversation with him on the 24th of May? A. 600 tons.

Q. And is that the 600 tons that you referred to in the postscript of the letter of May 23rd?

A. That is right.

Q. Reading the second paragraph of the opening portion of the letter, it states:

"A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be

(Testimony of Joseph B. Donnelly.)

set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month."

Now, in this conversation that you had with Mr. Whipple on May 24th, before this letter was sent, was the subject [674] of a purchase order discussed between you and him?

A. I told Mr. Whipple at that time when I spoke to him, that I had acknowledged his offer of 600 tons in a letter that I had dictated already to him and that I was forwarding that onto Cincinnati and would request them to issue the purchase order and the letter of credit in connection therewith.

Then he told me, in that same conversation, that he now had 1135 tons available and, maybe to clear this up: Since the first conversation with Mr. Whipple, at the time I wrote this letter there had been various quantities and shipping dates reported to me by Mr. Baglin, which I assume—or rather that I happen to know he got from Mr. Whipple, and all of them were nebulous, nothing that you could actually make a report on until the 600 ton offer came through, and that was the first one that was reported.

Q. (By Mr. Bronson): You did, then, in the course of this conversation on May 24th by phone with Mr. Whipple discuss the subject of the purchase order?

A. That is right.

Q. And you told him what about the purchase

(Testimony of Joseph B. Donnelly.)

order, as to where it was prepared and how it would be prepared, if anything?

Mr. L. B. Stanton: I object, that counsel is leading the witness. [675]

The Court: Well, I think it is permissible to direct attention to particular conversation. I know especially business men have the custom, which is attributed to lawyers, that they like to go into details. If you direct the attention of the witness to the conversation, that is permissible. Then, the contents of the conversation may follow. All right, you may answer.

The Witness: Yes. I did mention that to Mr. Whipple, because prior to——

The Court: No, no. Don't give any reason. [676]

Now, just answer the question without giving any reasons.

Mr. Bronson: Yes; what was said by you in connection with the purchase order?

A. I mentioned to Mr. Whipple that I would request a purchase order and a letter of credit to be issued from the East.

Q. Now, taking up the purchase order first, I have here and I have shown this to counsel who has one, a form under the heading Schenley Distillers Corporation and stating above that "Purchase Order." What is this document? It is blank, of course.

A. This is our standard form of purchase order.

Q. Do you know if that is used throughout the organization in that form?

(Testimony of Joseph B. Donnelly.)

A. Yes, sir; that is.

Q. I notice this one has somewhere on here a reference to San Francisco, does it?

A. That is right. It says "Sign and return copy No. 2 attached" to San Francisco.

Q. This is made out in 15 copies in all cases, is it?

A. Yes; 15 copies.

Q. I call your attention here to a second copy which is on pink paper as distinguished from the top one which is on white. That contains in the lower left "Vendor's [677] Acknowledgment Vendor to Sign and Return This Copy to the Company at 800 Tennessee Street, San Francisco 7, Calif. Accepted by Vendor." Then a blank line with the words beneath "Authorized Signature," and after that another blank line with the subscription "title." In handling these purchase orders what is required of the seller on that copy?

A. His signature.

Mr. L. B. Stanton: We object as being not a part of this case and not a part of any conversation with Mr. Whipple. It is merely with regard to the contents of the purchase order.

Mr. Bronson: I will possibly cure it. The witness has already answered but I will ask him this:

Q. Was this the purchase order, or a purchase order of this exact type with the possible exception of the "San Francisco" that you were referring to in the conversation with Mr. Whipple?

A. It is.

(Testimony of Joseph B. Donnelly.)

Mr. L. B. Stanton: I will object to the question upon the same ground. There is no testimony that this form of purchase order was ever submitted to Mr. Whipple or he knew anything about it. It is only hearsay from that angle.

Mr. Bronson: I am offering now—well, wait a minute. I don't know whether I have an answer. Will you read the [678] question back?

Mr. L. B. Stanton: I entered that objection.

The Court: I can't hear you.

Mr. L. B. Stanton: I ask that that objection be entered. It is an attempt to vary the terms of a written instrument.

The Court: Oh, no. The objection will be overruled. In view of the liberality I adopted in allowing all the written communications to be gone into, I certainly am not going to establish a rigid rule now.

Mr. L. B. Stanton: I appreciate that, your Honor. I make the objection for the sake of the record.

The Court: Well, that is all right. And I state for the sake of the record that when I adopt a liberal rule in allowing testimony, it applies to both sides, and not only to one side. I allowed all the evidence in, and I think it was by Whipple himself that there was some talk of a purchase order. I don't know whether that word appears. And if a contract is not complete, it is permissible to show that it was understood that other conditions were

(Testimony of Joseph B. Donnelly.)

to be complied with, and if there are not inconsistent with the writing, the rule which forbids the modification of a writing does not apply.

Mr. Bronson: I will offer into evidence the purchase order, just the second copy, the one that is numbered 2, [679] and has provision for the signature of the buyer. There are 15 copies altogether to the form, all more or less followed the same scheme.

The Clerk: Is this admitted, your Honor?

The Court: Why don't you receive them as one exhibit?

Mr. Bronson: I am puffing the record up again and it is all right. It may go in as one. It is quite all right.

The Court: They relate to one subject and they are merely the form used for that particular purpose. They may be received.

The Clerk: This is the Defendant's Exhibit U in evidence.

(Defendant's Exhibit U set out on pages 943, to 953.) [680]

Q. (By Mr. Bronson): In that conversation did you explain or state to Mr. Whipple what office in the East would issue your purchase order?

A. I believe I might have, but that is hard to say. If I did mention it, it would have been Cincinnati, because that would have been the office that it would come out of.

(Testimony of Joseph B. Donnelly.)

Mr. L. B. Stanton: I move to strike that.

The Court: That may be stricken beginning with "if I did mention it." The first part, "I believe I mentioned it," that sentence may stay.

The Witness: I believe I did.

The Court: That may stay; the other one may go out.

Q. (By Mr. Bronson): Well, generally, you stated a moment ago that you mentioned the subject of a letter of credit in the conversation on May 24, 1946 with Mr. Whipple. What was said on that subject?

A. I told Mr. Whipple that a letter of credit would have to come from the East because I was unfamiliar with them and did not even know what form they would be made out in, and that would have to come from New York which is our head office.

Q. Can you state whether any transactions in foreign trade or in large transactions such as the amount of money that was involved in the purchase of this glucose, the letter of credit would be handled on the west coast or the [681] east coast?

A. It would have to be handled in New York. Since I have been in California we have never handled a letter of credit. That is since 1938 when we established——

Q. Do you know anything about the form that that document takes?

A. I don't know a thing about a letter of credit,

(Testimony of Joseph B. Donnelly.)

except I know they are in various forms. I have never even seen one.

Q. You know that they are in various forms?

A. That is right.

Q. In the conversation that you mentioned you stated that the letter of credit would be issued from the East?

A. That is right.

Q. Did Mr. Whipple in that conversation ask you or did you discuss with him anything about the various types, any one of the various types of letters of credit that might be used?

A. No, sir.

Q. Was anything said about the terms of the payment?

A. No.

Q. That would be reflected on the letter of credit?

A. No.

Q. Was anything said between you in that conversation about the length of time that the letter of credit would [682] extend?

A. No; there was no conversation about that.

Q. I am referring you—will you look at the letter before you?

A. Yes.

Q. It says there toward the end of the opening portion of the letter: "Expiration date" referring to the letter of credit, "will be October 30, 1946, or as confirmed."

A. That is right.

Q. Where did you get that information from?

A. That was information I got from Mr. Baglin.

Q. Did Mr. Baglin in recounting the matter to you say anything about what the expiration date or

(Testimony of Joseph B. Donnelly.)

as confirmed meant? Did you have any information on that subject?

Mr. L. B. Stanton: Object on the ground it is hearsay.

The Court: That will be sustained unless that was communicated to Whipple.

Mr. Bronson: All right; let us withdraw the question and put it this way:

Q. In the conversation between you and Mr. Whipple the expiration date was not mentioned, I believe you said?

A. That is right; it was not mentioned.

Q. At the end of that conversation you attached this postscript, and I am calling your attention to the expression in the next to the last sentence—last two sentences, [683] rather: “The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.” Was that subject discussed between you and Mr. Whipple in the May 24th conversation just preceding the writing?

A. I don’t understand your question. What do you mean by “was that subject discussed”?

Q. Was the question of the conditions, the condition of the issuance of a purchase order and a letter of credit——

A. Oh, yes.

Q. ——in the manner you have described?

A. When Mr. Whipple called me on the 24th, or, rather, I consider him calling me although I

(Testimony of Joseph B. Donnelly.)

placed the call, as I said before, I told Mr. Whipple that I had written him a letter acknowledging the 600 tons, and mentioned to him about the letter of credit and the purchase order. And then he told me over the phone that he had a new offer of 1135 tons and gave me completely new shipping dates. And I told him that I would acknowledge that offer with the same conditions as the 600 tons.

Q. Now, thereafter did you have any communication with the East on the subject of this letter?

A. Yes. I wrote to Cincinnati, advised them of this letter and sent a copy of it. In fact I had written [684] the letter to Cincinnati on the 23rd, the same time I wrote the first part of the letter to Mr. Whipple, and then added the same postscript to the Cincinnati letter that I did to the letter to Mr. Whipple.

Q. You mentioned two of the conditions that are discussed in the opening portion of the letter, the purchase order and letter of credit. There is another one there. "Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles." Where did that come from, that stipulation in the opening portion of your May 23rd letter?

A. McCormick Steamship Company came from our own traffic department.

Q. When did you get that?

A. I got that probably on May the 22nd or early on the 23rd.

Q. Had there ever been any reference to a steam-

(Testimony of Joseph B. Donnelly.)

ship line in any prior communication between you and Mr. Whipple?

A. There had never been any reference made to the carrier.

Q. This may be a repetition. Referring both to the purchase order and the letter of credit was there any discussion between you and Mr. Whipple in any of the conversations as to the contents and makeup of either document? [685]

A. No, sir; there was not.

Q. Just one further question, Mr. Donnelly. It has reference to an expression in some letter or letters from Mr. Whipple directed to Mr. Baglin. Did you in the course of your discussions ever discuss metric tons or distinguish metric tons from the ordinary ton that we deal with of 2,000 pounds in your discussion with Mr. Whipple?

A. No; at no time.

Mr. Bronson: That is all.

The Court: All right, cross-examine.

Cross-Examination

By Mr. E. B. Stanton:

Q. You never mentioned anything to Mr. Whipple at any time about ever requiring the signature of Engraw for anything, did you?

A. No, sir; I did not.

Q. At that time, at least, you personally knew nothing about the issuance of letters of credit, did you?

A. May I qualify when you say "at that time," what date are you speaking of?

(Testimony of Joseph B. Donnelly.)

Q. I am speaking of the time of May 23rd and May 24, 1946. You were not familiar with the process yourself?

A. That is right; I was not familiar.

Q. You personally had the authority to sign that purchase order or any purchase order for that or any other amount right here on the Pacific Coast, didn't you? [686]

A. Yes; I would say I have the authority.

Q. So there wasn't any reason for you to have to send this thing back to Cincinnati?

A. Is that a question?

Q. That is a question.

The Court: Yes.

A. The reason was that because sugar or glucose is something that I normally do not purchase on the West Coast. I prefer always having that handled in Cincinnati, our main office; and then, secondly, the amount was pretty large and I would prefer our head purchasing organization to handle the purchase order for \$600,000.

The Court: Let me inject a question. Did you inform Mr. Whipple of either or both of those reasons?

The Witness: No; I did not inform him of the reasons. No, sir.

The Court: You merely told him that the purchase order would have to be issued?

The Witness: That is right.

The Court: In the East?

(Testimony of Joseph B. Donnelly.)

The Witness: That is right.

Q. (By Mr. E. B. Stanton): Did you tell him it would have to be issued in the East?

A. I told him it would be issued in Cincinnati in our conversation with him. When I say I told him that—— [687]

The Court: I am sorry I asked that question because he said, as a matter of course, "East." Cincinnati is east for us, but I assume in view of the fact that they have an office in New York, New York would be "East."

Q. (By Mr. E. B. Stanton): By that you were referring to this formal purchase order which you have identified? A. Yes, sir.

Q. You have arranged for purchases many times prior to this occasion without the signature of the formal purchase order, haven't you?

A. I did not hear the last part. I have arranged purchase orders——

Q. You have arranged for purchases——

The Court: You arranged to make purchases without a formal purchase order?

Q. (By Mr. E. B. Stanton): Without the issuance of a formal purchase order, haven't you?

A. I have made arrangements, but none of them have ever been concluded until a purchase order is issued and signed, because that is a rule of our corporation.

Mr. E. B. Stanton: I move to strike that answer as not responsive to the question.

(Testimony of Joseph B. Donnelly.)

The Court: No, no. You asked for it. It will have to remain.

Mr. E. B. Stanton: The latter part, "because that [688] is a rule of our company," is certainly not responsive to the question, your Honor.

The Court: Well, that is not a good objection to this court, anyway, if an answer is material, the mere fact it was not called for in question, unless it is totally foreign. That is merely a reason. He is giving you a reason. He had already stated to Whipple that a purchase order would have to be forthcoming. It is not a good objection. Somebody has put it in the Code of Civil Procedure but we are not bound by it in the Federal Court. I will never strike an answer merely because it is not responsive, if it is material and bears upon the issues.

Q. (By Mr. E. B. Stanton): You considered the method, yourself, prior to May 24th of handling the whole thing right out here without going to Cincinnati, didn't you?

A. No, sir; I did not.

Q. I want you to cast your mind back on this thing very carefully, Mr. Donnelly, and I ask you again, didn't you consider prior to May 24th that you personally could handle the whole thing out here in California? You are the West Coast purchasing department, aren't you; you are the head of it?

(Testimony of Joseph B. Donnelly.)

The Court: You are getting away from your question.

Mr. E. B. Stanton: I will withdraw the question.

The Court: You will have to ask either the first question or the second question. [689]

Mr. E. B. Stanton: I will withdraw the question for the moment.

The Court: Yes.

Q. (By Mr. E. B. Stanton): You personally are the head of the West Coast purchasing department?

A. I guess you would say that since the purchasing agent works directly for me.

Q. Yes. A. That is right.

Q. You personally prior to May 24th had under advisement, at least, the idea that you would handle this transaction without going through Cincinnati at all?

Mr. Bronson: I will have to object to the form of that question. It calls for a conclusion.

The Court: I am sorry. I was talking to my crier and I missed the import of the last question.

(Question read by the reporter.)

The Court: The objection will be sustained. It has been sufficiently answered by the previous questions.

Mr. E. B. Stanton: All right.

The Court: What he had in mind is not material; it is what he did.

(Testimony of Joseph B. Donnelly.)

Mr. E. B. Stanton: I think, your Honor, it is material for this reason: He claims he told Mr. Whipple this thing had to be handled through Cincinnati. I intend to show by [690] documentary evidence in this man's own letter to which he has referred that he did consider such a thing; that his mind was not made up as to which way he would go; and that he did in fact decide upon a method of proceeding right here from Los Angeles, and that by the wording in this letter he did proceed from Los Angeles.

The Court: That is an argument, and the answer he has given to you to the same question two different ways is sufficient. When a witness has given you a negative answer and I am charitable and allow it to be asked in a different way, you do not have to approach it from all the facets of the art of cross-examination, when he has given you an answer in two ways. I will sustain the objection.

Furthermore, they have admitted that he had authority to sign those agreements, so that that is not material. The main question is whether this agreement was a completed agreement or was not to be effective until other matters had been complied with, and that is the testimony to which this is directed and that is why I allowed you, when Mr. Whipple was on the stand, to go into all the preliminaries and go into all the post-preliminaries so as to see whether this was an absolute understanding, complete in itself, or there were other

(Testimony of Joseph B. Donnelly.)

things to be done later on, because that is the issue that is being made in this case. My reason is more clearly stated now, because I know more about the case than I did when the other testimony was given. All right.

Q. (By Mr. E. B. Stanton): When you stated that you sent a report on the whole transaction and attached a copy, are you referring to a report which you sent to Mr. Carl J. Kiefer? A. I am.

Q. I show you Plaintiff's Exhibit 58 and ask you to examine it and see if that is the letter to which you referred in your direct examination? Note that it has a copy of your letter of May 23rd attached.

A. That is right; that is the letter.

Q. You have examined it all the way through; you know that is——

The Court: He has identified it. He does not have to read every word of it if he admits it.

A. It is my letter.

The Court: It is your letter; all right.

Q. (By Mr. E. B. Stanton): You say you never advised Mr. Whipple at any time that you would require the signature of Engraw in South America to the purchase order or any other document, did you?

A. No; I did not personally advise Mr. Whipple of that.

Q. You did not direct anyone to advise him of that [692] fact, did you?

(Testimony of Joseph B. Donnelly.)

A. I did not direct anyone. I just told Mr. Whipple that I would get a purchase order. A purchase order automatically requires a signature, as I said before, to complete the deal.

Mr. E. B. Stanton: I move to strike that last portion of the answer.

The Court: No. This is cross-examination. You can't argue without having an argument back with the witness. Besides, a glance at the order, I think, shows it is a purchase order. That instrument has become very well known in the last 10 years, especially since the war.

Mr. E. B. Stanton: I have no further questions.

The Court: All the purchases made by the Government during the war were by purchase order, all the purchases by the big companies, the aviation companies, during the war were made on that basis. And an examination of the blanks show that they call for a signature by both parties, otherwise that would be a unilateral contract.

Mr. Bronson: I have one other question I would like to ask the witness.

The Court: All right; go ahead. [693]

Redirect Examination

By Mr. Bronson:

Q. Would you be buying a half a million dollars worth of glucose without having the signature of the seller agreeing to deliver it?

The Court: Well——

Mr. Bronson: My goodness.

(Testimony of Joseph B. Donnelly.)

The Witness: May I answer that?

Mr. Bronson: There has been no objection.

The Court: There has been no objection made. Did you hear the question? I think young Mr. Stanton—I always forget his name——

Mr. E. B. Stanton: Edward.

The Court: Edward. Off the record:

(Brief comment off the record.)

Mr. E. B. Stanton: May I have the last question read, your Honor?

The Court: Yes. Mr. Bronson noted that you probably did not hear it. It was a leading question and the witness did not answer it, so I will have it read to you.

(Question read by the reporter.)

Mr. E. B. Stanton: I object to the question as leading the witness.

The Court: All right, I will sustain the objection.

Mr. Bronson: You may step down. [694]

Mr. E. B. Stanton: One moment, please. Excuse me just a moment. May I have just a moment?

The Court: All right.

Mr. E. B. Stanton: May I reopen my cross-examination?

The Court: Oh, I am not going to stand on ceremony if you have a question you overlooked.

Q. (By Mr. E. B. Stanton): I call your attention now to this purchase order which is Defendant's Exhibit No. U. On the reverse of the pur-

(Testimony of Joseph B. Donnelly.)

chase order you will note "Terms and Conditions." Will you detail here and now which of those terms and conditions you discussed with Mr. Whipple over the telephone?

A. I discussed none of these terms and conditions with Mr. Whipple over the telephone.

Q. You did not tell him about any one of them?

A. Certainly not. All I told Mr. Whipple was that he would receive a purchase order, and, as I stated before, I expect him to read the fine print.

Q. Did you tell Mr. Whipple that he was going to get the purchase order or that Engraw was going to get the purchase order?

A. No; Engraw was going to get it. You see, at no time did I know Mr. Whipple and Engraw were not the same party. As far as I was concerned Mr. Whipple was an agent for Engraw and they were one and the same party as far as [695] my feelings were concerned.

Mr. E. B. Stanton: Nothing further.

The Court: All right. Step down.

Mr. Bronson: Does your Honor wish to take an adjournment at this time or shall we go ahead?

The Court: How long is this present witness going to be?

Mr. Bronson: Oh, about as long or perhaps a trifle longer than the last witness.

The Court: If there is a possibility of concluding it, go on.

Mr. Bronson: If that is your preference. I don't know.

Mr. E. B. Stanton: Oh, I would say we will have rebuttal testimony in any event, your Honor. We would not be able to finish the case tonight.

The Court: I thought you did not have any rebuttal oral testimony.

Mr. E. B. Stanton: In view of the fact that these depositions were being put in, we will have to have rebuttal testimony for those.

The Court: Well, I did not know.

Mr. E. B. Stanton: Well, in any event I have to recall Mr. Berger for rebuttal testimony.

The Court: Well, that is all right. It suits me very [696] well, gentlemen to adjourn at this time. I merely thought if there was a possibility of concluding with that witness, why, we might do that.

Mr. Bronson: We will conclude tomorrow I am pretty sure.

The Court: All right. Have any rebuttal tomorrow morning.

Mr. E. B. Stanton: Yes, your Honor.

The Court: We will take an adjournment until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m. of the following day, Friday, June 4, 1948.) [697]

Friday, June 4, 1948, 10:00 a.m.

Mr. Bronson: Call Mr. Baglin to the stand, please.

ROBERT H. BAGLIN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Robert H. Baglin.

The Clerk: The spelling of your last name?

The Witness: B-a-g-l-i-n.

Direct Examination

By Mr. Bronson:

Q. Your name is Robert H. Baglin, is it not?

A. Yes, sir.

Q. And you live at where?

A. San Carlos, California.

Q. You are connected with the Schenley Distillers Corporation? A. I am.

Q. And you are assistant to Mr. Donnelly, a witness in this case yesterday, are you not?

A. I am.

Q. Your office is in San Francisco?

A. Yes, sir.

Q. Are you an officer of any Schenley Company, that is, [700] in the sense of being president, vice-president, secretary, treasurer or assistant to any of those officials?

A. One of the affiliated companies, Schenley Distillers, Inc., I am an assistant secretary.

Q. You were in court yesterday during Mr. Don-

(Testimony of Robert H. Baglin.)

nelly's testimony. I will call your attention, to get right to the matter at once, to an exhibit in this case; it is called Plaintiff's Exhibit 2, being a letter with your signature or a signature over your name, dated May 20th, addressed on the heading of Schenley Distillers Corporation to Harold A. Whipple Company, Los Angeles. Are you familiar with that letter? A. Yes, sir; I am.

Q. I will call your attention to the opening lines: "This will confirm our telephone conversation of today on the subject of Argentine glucose." Did you have a conversation with Mr. Whipple on May 20th, the date of that letter? A. I did.

Q. By telephone? A. By telephone.

Q. And you were where when you talked to Mr. Whipple? A. In my office.

Q. And he was where?

A. In Los Angeles.

Q. In Los Angeles. As to the subject of the conversation [701] between you and Mr. Whipple on that occasion what was it; what was said?

A. I believe that is pretty well covered in my letter, my confirming letter.

Q. You are referring to the exhibit you have in your hand? A. That is right.

Q. So far as you can recall now, was there any subject outside of amenities and things of that sort, additional to the contents of your letter?

A. No, sir; none that I can recall.

(Testimony of Robert H. Baglin.)

Q. You state in the second paragraph: "We are interesting in purchasing up to 1,000 tons." Followed by some shipping schedules and a reference to a possible additional 300 tons. Will you state whether or not you made any statement additional to an expression of interest in the purchase in the conversation you said you had that day?

A. No, sir.

Q. The reference in the letter, Mr. Baglin, to the specifications of the glucose that are contained in the third paragraph, was that also discussed, as you said, in the telephone conversation?

A. It was.

Q. Who specified that particular detail there?

A. Mr. Whipple.

Q. In the same paragraph—I am reading—"It is understood that we will be purchasing by letter of credit direct from the Argentine shipper." Was that subject discussed also in the conversation?

A. Well, we were discussing Argentine glucose.

Q. There is reference there, in the last paragraph, to "We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit." Was that likewise stated in the course of the conversation by you to Mr. Whipple?

A. It was.

Q. Did you have any phone conversations with Mr. Whipple between May 20th and the date upon which—well, I will strike that and call your attention to an exhibit in the case, a wire to—I may be

(Testimony of Robert H. Baglin.)

a little slow getting this, if the Court will bear with me.

The Court: All right.

Mr. Bronson: This has reference, if your Honor please, the next subject of inquiry, to Exhibit No. L for the defendant, reading: "Credit 1135 Issued in New York Through Chase or Bankers Cabling Number Later."

Mr. L. B. Stanton: I can't hear you, Mr. Bronson.

Mr. Bronson: I am reading the wire. "Credit 1135 Issued in New York Through Chase or Bankers Cabling Number [703] Later."

Q. Did you have any discussions up to the 28th of May by phone with Mr. Whipple on the subject of issuance of letters of credit?

A. Yes; I did.

Q. Where did those calls originate from, you or him, in the main?

A. In the main, I would say they originated with Mr. Whipple.

Q. Did you have any discussion with him about May 28th on the subject of what bankers would issue letters of credit or the subject of the banks through which Schenley was dealing in New York, with Mr. Whipple? A. I did.

Q. What was said in that conversation?

A. Well, Mr. Whipple was pressing me for the name of a bank or banks that the letter of credit might be issued through. I told Mr. Whipple that

(Testimony of Robert H. Baglin.)

there was two banks that I knew my company did business with in the East, that is in New York. I named the Bankers Trust and the Chase National Bank.

Q. Will you state whether or not you made any statement on the subject that those banks or either of them would be issuing letters of credit or had issued letters of credit on this transaction? [704]

A. No, sir; I could not do that.

Q. Now, another exhibit is in here. I won't take the time to search for it. It is a wire from Mr. Whipple to Engraw on the 24th of May, Mr. Whipple to Engraw, stating that the letter of credit would be issued the following Monday. I showed you a copy of that wire. Have you that in mind?

A. I know the wire you refer to; yes.

Q. Did you ever have any discussion or make any statement to Mr. Whipple by phone on that subject, promising an issuance of letters of credit on any day?

A. No, sir; I did not.

Q. One other matter referring to the testimony of Mr. Whipple which was before you came to court yesterday, between the 23rd of May and the 28th of May, according to an exhibit entered here there was some conversation by wire between Whipple and Engraw on the subject of 400 additional tons of glucose to the 1135 tons that were referred to in Mr. Donnelly's letter May 23rd. Did you ever have any discussion with Mr. Whipple by phone or other-

(Testimony of Robert H. Baglin.)

wise on the subject of the purchase of 400 additional tons? A. No, sir.

Mr. Bronson: You may cross-examine. [705]

Cross-Examination

By Mr. E. B. Stanton:

Q. With reference to that 400 tons you meant in your answer, Mr. Baglin, from the standpoint of "no, sir"—does that mean a positive statement now that you did not have any conversation about the 400 tons, or does it mean that you do not remember whether or not you had such a conversation?

A. I am referring to 1946 production now.

Q. I don't believe that quite answers my question.

A. Well, I make that stipulation for the reason that some 1947 production was discussed.

Q. And did you discuss 400 tons for 1947?

A. I do not recall the quantity of 400 tons; no, sir.

Q. Did Mr. Whipple say anything to you about 200, an additional two to four hundred tons that he had received a communication from his principals in Argentine? This was after the 1135-ton transaction, he had received a communication from the Argentine in which they had available an additional two to four hundred tons?

A. Of 1946 production?

Q. No; regardless of whether it is 1946 or 1947, do you remember that he communicated to you that he had received word from the Argentine that there

(Testimony of Robert H. Baglin.)

was an additional two to four hundred tons available? [706]

A. No, sir; I do not recall a conversation of any additional two to four hundred that you speak of.

Q. That is for either 1946 or 1947?

A. I won't say for 1947.

Q. In other words, it might have been possible for 1947? A. That is right.

Q. And it is also possible that you told him that you would be interested in that for 1947 at that time, isn't it? A. No, sir.

Q. Did you receive the copy of a letter which Mr. Whipple sent to Many Blanc?

A. I did, sir.

Q. What did you do with that copy when you received it? A. It went to the files.

Q. Was it turned over to Mr. Woolsey?

A. Subsequently, yes.

Q. This was the first transaction that your office had been involved in in the purchase of South American glucose, wasn't it? A. It was.

Q. In fact you had not purchased any glucose prior to this time, had you? [707] A. No, sir.

Q. And this was your first contact with a South American shipper, too, wasn't it?

A. That is right.

Q. So you were not just too familiar with the procedure, then? A. I was not. [708]

Q. (By Mr. E. B. Stanton): You had been told by Mr. Donnelly that the company required this

(Testimony of Robert H. Baglin.)

glucose for immediate delivery, hadn't you? They needed it right then?

A. No, I can't recall that.

Q. Did Mr. Donnelly tell you that the company required the glucose for immediate delivery and needed a continuity of shipments?

A. Yes, that is correct, the continuity of shipments, but not the matter of immediate delivery, I don't recall that.

Q. Well, you recall having your deposition taken on the 22nd of July?

Mr. Bronson: We will waive the formality of identification of it and stipulate that it was taken on the date that you mention and that the answers given in answer to the questions were as transcribed in the copy you have, assuming it is the same as ours.

Mr. E. B. Stanton: Thank you.

Q. I call your attention to this page 41 of your deposition, line 25:

"Q. Didn't Mr. Donnelly tell you about the requirement for immediate delivery?

"A. Yes."

The Witness: Yes.

Q. (By Mr. E. B. Stanton): Does that refresh your recollection, now? [709]

A. Well, I believe I will have to question the word "immediately."

Q. You made that statement at that time, however?
A. In that deposition.

(Testimony of Robert H. Baglin.)

Mr. Bronson: In answer to that question, as you put the words, I will stipulate to that, counsel.

Q. (By Mr. E. B. Stanton): You discussed this matter of 1947 production with Mr. Donnelly?

A. Briefly.

Q. And you left Whipple with the idea that you would negotiate the 1947 production, later?

A. That is right.

Q. Now, along about May 28th you had a discussion with Mr. Whipple about the letter of credit and didn't you tell him at that time that the letter of credit was in the hands "of our Eastern offices"?

A. That is right—the handling of the letter of credit.

Q. That was in the same conversation when you mentioned the matter of banks?

A. I recall that it was, yes.

Mr. E. B. Stanton: Are these the plaintiff's exhibits here?

The Clerk: The plaintiff's exhibits carry numbers.

Mr. E. B. Stanton: Oh, yes. [710]

Q. I will show you Plaintiff's Exhibit 3 and ask you if you recognize that?

(Mr. E. B. Stanton hands said exhibit to the witness.)

A. I do.

Q. And you will note that that is the letter from Mr. Whipple and it states in the first paragraph,

(Testimony of Robert H. Baglin.)

“Confirming our telephone conversation of today,”
—now, does that letter truly reflect the telephone
conversation as you recall it?

Mr. Bronson: Is that the letter of May 21st?

Mr. E. B. Stanton: Yes.

A. I would say yes, in substance, it does.

Q. Now, I ask you the same question in respect
to Plaintiff’s Exhibit 4, I ask you to examine this
letter from Harold A. Whipple to your attention
and ask you if that reflects, as best you recall, the
conversation on the date represented in that letter?

Mr. Bronson: What letter is that?

Mr. E. B. Stanton: That is the letter of May
23rd.

A. No, sir. It does not.

Q. Now, in which respect?

A. Mr. Whipple——

Q. What are you referring to in the letter, first?

A. The letter being directed to my attention and
confirming the telephone conversation we had that
morning. [711]

Q. I see. You had no telephone conversation
that morning? A. I did not.

Q. You had no telephone conversation with Mr.
Whipple on the morning of the 23rd?

A. Not conversation—I might have had a tele-
phone conversation, but it was not covering the
subject of this letter.

Q. Did you ever write to Mr. Whipple and dis-
affirm that letter?

(Testimony of Robert H. Baglin.)

A. No, I did not. It was understood that Mr. Whipple had the telephone conversation——

Mr. Bronson: One moment. I move what he understood be stricken.

The Court: Well, you can explain an answer by giving what was said but not your understanding.

The Witness: Mr. Whipple——

The Court: If you want to explain your answer, you may do so.

The Witness: Mr. Whipple had the telephone conversation which he refers to, with Mr. Donnelly.

(A short intermission followed.)

Mr. E. B. Stanton: Excuse me, your Honor. Do you have the exhibits in the Heymsfeld deposition?

In the interests of saving time, while we are getting [712] those exhibits, we could recall Mr. Baglin.

Mr. Bronson: It might be evidence that we can stipulate to. What is it?

Mr. E. B. Stanton: I want to have him examine the record as to the telephone bills, which are in the Heymsfeld deposition exhibits here.

Mr. Bronson: I have it here.

Mr. E. B. Stanton: We have them now.

Q. By stipulation of counsel I am showing you what is a copy of the exhibit attached to the Heymsfeld deposition. I show you a copy of vendor's bill,

(Testimony of Robert H. Baglin.)

vendor Pacific Telephone & Telegraph Company.
Do you know what this record it?

A. Yes, I do.

Q. What is it?

A. Our accounts payable department must have a copy of the vendor's bills in their office, as well as our New York office, so they send to our New York office the vendor's original and they prepare a document like this for the local accounts payable office.

Q. Does this reflect the telephone calls that you made from the period of May 13th through June 3rd?

Mr. Bronson: You mean him individually?

Mr. E. B. Stanton: Him individually.

Mr. Bronson: I think it speaks for itself. It doesn't indicate the individual calling. We will object on the [713] ground that the record is the best evidence of what it shows.

The Court: No. The record may not show.

Mr. E. B. Stanton: The record does not show just who made the calls.

The Court: Therefore he may be asked to explain it. I presume the custom obtains universally that the name of the person who calls is never put down, because that is governed by the number.

Mr. Bronson: I may have misunderstood. I thought he was asked to state if it showed what calls he personally put in.

Mr. E. B. Stanton: That is what I am asking.

(Testimony of Robert H. Baglin.)

The Court: Yes, he is asking whether he was the source of the call, which his telephone bill would not show.

Mr. Bronson: All right.

The Court: Because they charge to the telephone bill all calls which originate from that number and they indicate the person to whom it went unless it is a station to station call.

Mr. Bronson: With that understanding I will withdraw the objection.

The Witness: May I have the question repeated?

(Pending question read by reporter.)

A. On that particular phone, yes.

Mr. E. B. Stanton: I show you the next exhibit. For the record I was there referring to Exhibit——

Mr. Bronson: 10-N.

Mr. E. B. Stanton: ——10-N.

Mr. Bronson: And they are all “N,” but it is the 10th exhibit from the top.

Mr. E. B. Stanton: (Continuing) I was referring to Exhibit 10-N for identification in the Heymsfeld deposition which is now in evidence.

Q. Now, are you aware of the question, now, Mr. Baglin? I am asking you if this record, the second sheet here or the contents of the first sheet on which I questioned you, dated June 11th, carries the telephone calls which you made from June 6th to June 10th?

(Testimony of Robert H. Baglin.)

A. The telephone calls I made, yes.

Q. On that particular phone, these were all your calls?
A. That is right.

Mr. Bronson: May I ask counsel about that: The second sheet of that Exhibit 10-N of the Heymsfeld deposition doesn't have any calls listed for the 6th of June?

Mr. E. B. Stanton: Do those bills correctly show the parties whom you called?

A. That is right.

Mr. E. B. Stanton: That is all. [715]

Redirect Examination

By Mr. Bronson:

Q. Before you leave the stand, counsel asked you about immediate shipment and called your attention to page 41 of the deposition, line 25, reading, "Didn't Mr. Donnelly tell you about the requirement for immediate delivery?"

"A. Yes."

I am reading now the questions and answers that immediately follow that, at the very top of the next page:

"Q. What did he say?"

"A. Well, as I recall, it was possibly discussed, the necessity of our getting a continuity of shipments.

"Q. A continuity of shipments? That is, a shipment every month or so, every month?"

"A. Yes.

(Testimony of Robert H. Baglin.)

“Q. Was there anything said about getting immediate delivery of all the glucose purchased?

“A. Well, I believe that was established earlier.

“Q. When was it established?

“A. Between Mr. Donnelly and Mr. Whipple.”

You gave those answers to those questions, did you not?

The Witness: I did.

Mr. Bronson: That is all.

The Court: All right, step down.

Is there anything further, gentlemen? [716]

Mr. Bronson: May I have just a moment, if your Honor please.

My associate calls my attention to the fact that a letter written on inter-office communication, headed “By Mr. Berger to Mr. Dichter,” and dated August 2nd at Buenos Aires, is objected to by us on the ground that it is self serving, and your Honor sustained the objection. Now, that exhibit is an exhibit also in the Heymsfeld deposition. I was not aware of it when I moved into evidence the entire Heymsfeld deposition. I would like it to be understood as not being offered with that deposition.

The Court: Let us identify it so I will know, gentlemen, when I get to reading your depositions, where it is.

Mr. Bronson: Very well. The exhibit is Exhibit 64-N of the Heymsfeld deposition and it is marked for identification in these proceedings.

The Court: Well, let us give it a number for

identification in this case and then I will know it is not included.

Mr. L. B. Stanton: A number has already been given to it, for identification.

The Court: Pardon me?

Mr. L. B. Stanton: A number has already been given to it for identification.

Mr. Bronson: Exhibit 15, for identification.

The Court: Do you have it? [717]

The Clerk: We have it in a separate file.

The Court: That is all right. It is properly marked. I think this is the original, or is this a duplicate copy? No, I think this is the original of the letter. It is already marked for identification. Then, it will understood that in offering this, the exhibit is not included.

Mr. Bronson: That is right.

The Court: All right. That is sufficient.

Mr. Bronson: That concludes the defendant's case, excepting only on those depositions on letters rogatory.

The Court: All right.

(Whereupon the defendant rested its case in chief.) [718]

The Court: Is there any rebuttal?

(And thereupon the plaintiff, to further maintain the issues on its behalf, offered and introduced the following evidence, in rebuttal, to-wit:)

Mr. L. B. Stanton: We will offer, your Honor, the depositions of Doctors Horacio Beccar Varela and Dr. Alberto Padilla.

The Court: Let us get them. Just a minute until the Clerk identifies them individually and gives them numbers.

The Clerk: Does counsel know where those depositions are?

Mr. L. B. Stanton: They are in that file of depositions which came from South America.

The Court: In this group.

Mr. L. B. Stanton: I think they are all in one file.

The Court: Can you separate those from the group?

Mr. L. B. Stanton: They are Dr. Horacio Beccar Varela and Dr. Alberto Padilla.

The Clerk: The deposition of Dr. Horacio Beccar Varela is marked Plaintiff's Exhibit 61. Is this admitted, your Honor?

The Court: What?

The Clerk: Is this admitted?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 61 in evidence. And is the other also admitted, your Honor? [719]

The Court: Yes.

The Clerk: The deposition of Alberto Padilla is marked Plaintiff's Exhibit 62 in evidence.

Mr. L. B. Stanton: I think I may also offer, at this time, the report of the United States Consul

on the request to take the deposition of the official of the Argentine Government. It deals with export licenses.

Mr. Bronson: May I see what it is?

The Court: Is there something, Mr. Clerk?

The Clerk: These gentlemen don't identify the documents. Is that something already in?

Mr. L. B. Stanton: It is in the batch, here, Mr. Clerk.

The Clerk: What you are offering is the certificate of Mr. Trowbridge?

Mr. L. B. Stanton: Of Jones R. Trowbridge, consul of the United States of America.

The Clerk: Certifying to the nonappearance of Hector A. R. Alfonso?

Mr. L. B. Stanton: Correct.

The Clerk: That is marked as Plaintiff's Exhibit 63, in evidence.

Mr. E. B. Stanton: Mr. Berger. [720]

G. FRED BERGER

recalled as a witness herein on behalf of the plaintiff, in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. E. B. Stanton:

Q. Mr. Berger, in your experience as an importer and exporter operating an import-export firm, you had occasion to deal with contracts in

(Testimony of G. Fred Berger.)

which there were letters of credit such as were proposed in this case? A. Continuously.

Mr. Bronson: We object to that because it contains matters not in evidence, the "letters of credit." The terms haven't been discussed.

Mr. E. B. Stanton: I didn't say anything about the terms.

The Court: This may be—I think you inquired into that generally on direct examination. I will consider that as a preliminary question. I don't know what you seek to produce at this time. This witness was examined in chief and at that time he was asked, when the question was raised, whether he was qualified to determine as to custom which obtained as to letters of credit and as to the time it would take for a certain letter of credit to come through you, and I think he gave generally his experience.

Mr. E. B. Stanton: By the way of explanation [721] your Honor, this is rebuttal testimony to certain portions of the Metcalf deposition which was introduced by the defendant.

The Court: Well, as long as I have not had the time, gentlemen, to read the depositions, you will have to call my attention to it, before I can determine whether it is material or not.

Mr. E. B. Stanton: Yes. All right. On page 14 of the Metcalf deposition there appears the question:

"Q. Don't you know that export business cannot be done if they had to wait for interoffice commu-

(Testimony of G. Fred Berger.)

nications between various cities in the United States pending the purchase by the person offering the glucose?

“A. The guts of an export contract is a letter of credit, and I have never known an exporter to make a commitment before the letter of credit or the formal order had been issued.”

Now, I had intended to produce testimony by this witness to rebut that particular statement in this deposition.

The Court: That sounds like a cross-examination question that was asked of Metcalf.

Mr. E. B. Stanton: That is correct.

The Court: Well, all right.

Mr. Bronson: This was the plaintiff's deposition of Mr. Metcalf, if your Honor please, that he just read from. [722]

The Court: Well, of course, I say it is cross-examination. It is in the nature of cross-examination.

Mr. Bronson: I don't think so, your Honor. I may be wrong in this, but——

The Court: Well, who offered it?

Mr. Bronson: We offered it, but Metcalf, when they took the deposition, was no longer an employee and had not been; in fact, he said he was never employed——

The Court: Of course, if you offered it, they have a right to contradict it, regardless of the matter of who took it. All right. You may answer.

(Question read by reporter.) [723]

(Testimony of G. Fred Berger.)

The Witness: May I have the question, please?

(Question read by the reporter.)

A. Yes.

Q. (By Mr. E. B. Stanton): Approximately how many times?

A. Well, we deal in that type of transaction practically daily because our commitments are made with various firms in the United States, and always are made either by telephone conversation or by cable asking us to make purchases, and the letters of credit invariably follow.

Q. Do you make commitments as a matter of practice in the Argentine before you receive the actual letter of credit?

A. We would have to make them immediately because, under the circumstances of a market which fluctuates and on which given prices are provided over an optional period, you would either have to close at once or you do not get your goods. So those transactions always are completed immediately once we know definitely that the party wants the goods.

Q. Referring to the three-way conversation between Mr. Metcalf, Mr. Dichter and yourself that took place, I believe you stated, in the early part of July when you and Dichter were in the Argentine and Metcalf was in New York, what, if anything, do you recall that Mr. Metcalf said [724] with reference to Dr. Goytia?

A. We had discussed the matter of our telegram and the recommendations that were made under it,

(Testimony of G. Fred Berger.)

and Mr. Metcalf stated that they seemed to be all right to him and referred it to Dr. Victor Goytia for the completion of the details. I intervened at the moment to inform Mr. Metcalf that Dr. Goytia was also our attorney, and his reply to that was, "Well, so much the better because, if he knows all about the case, there will be that much less difficulty in arranging details."

Q. The details of what?

A. The details of settlement, of liquidating. It was supposed to be a liquidation, not settlement.

Q. In this conversation, the same conversation, was there any mention by anyone concerned in the conversation, any one of the three parties, of the matter of export licenses? A. No, sir.

Q. Now, as an import-export business man from the Argentine, do you know whether or not there are any publications, trade journals or other publications, which are used by people in that type of business in the Argentine?

A. The majority of that type of business is done through the Bolsa de Comercio—in English, the Stock [725] Exchange—through the commodity division; and in the Stock Exchange Building there is an organization which, from the records of the stock exchange and from customs records, that is, outgoing customs records reports entirely monthly on all shipments that are made of every kind of commodity from the Argentine.

Q. What is the name of that concern?

A. It is Resumen Mensual de Exportacion,

(Testimony of G. Fred Berger.)

which means monthly report. I think it is Resu-men Mensual de Exportacion Bolsa de Comercio. I am not exactly sure about the title, but it is approximately correct.

Q. Is that publication circulated?

A. Oh, yes; it is circulated to all of those of us who are members of the Bolsa. We pay for the service the same as you would for any service of a similar type in this country.

Q. Did you have occasion to use that publication in 1946?

A. We use it all the time. In 1946, of course.

Q. In what respect do you use it?

A. Well, we use it for the purpose of keeping in touch with the movements of goods out of the Argentine and the destination of those goods, so that we can keep our own record of the market straight and follow through with our own suggestions when we want to sell something. [726]

Q. Mr. Berger, I ask you to examine these five folders and tell me, if you know, what they are?

A. There are six of them.

Q. There are six folders?

A. Yes. These are the covers of the monthly report of exportation of the products of the Argentine Republic running from June, 1946, through November, 1946.

Q. You will find in each cover a page. Can you identify that page?

A. Yes; this is the page pertaining particu-

(Testimony of G. Fred Berger.)

larly to glucose and is one of probably a hundred pages in each of these books.

Q. What is this page pertaining to glucose—pertaining to it in what fashion?

A. Pertaining to it, showing—

Mr. Bronson: I think, if your Honor please—just a minute. I am sorry to interrupt you. The record is the best evidence of what it is. And I have to anticipate the fact that we, by excerpting just this one page from each one, haven't in mind there as to what the quantities are or when the exports were made, when the applications for licenses or issuance of license were made. It is utterly silent on those things. We haven't any kind of interpretation of even quantities stated. And in the light of that, for the witness to try to say here, it is putting his interpretation on things and the record is the best evidence.

Mr. L. B. Stanton: They do not show when the license was issued.

Mr. E. B. Stanton: That is our position; that is immaterial in any event.

Mr. L. B. Stanton: They do show when the export was made.

Mr. Bronson: I beg your pardon. Were you addressing me? I did not realize that. I am sorry.

Mr. L. B. Stanton: They do not show the time when the licenses were granted.

The Court: These are dates of export.

Mr. Bronson: Then that is immaterial.

The Court: Monthly summary of exports of fruits.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: It can hardly be immaterial if counsel is taking a position that it was impossible to export glucose during a certain period of time, and here is the trade record which shows that exports were made in May, June, July, August, September, October of 1946, each and every month. It gives the quantity of the glucose exported in each month and by whom it was exported and where the destination was.

Mr. Bronson: Your Honor, I am not here to argue that point, but the answer to it is that it hasn't any meaning, [728] for the simple reason that export licenses are granted and the shipments may not take place for six months thereafter.

Mr. L. B. Stanton: Now you are arguing the case.

Mr. Bronson: So is your son, Mr. Stanton.

The Court: Both of them have been doing that very successfully during the course of the trial, gentlemen. I wonder what there will be left to argument. As I look at the record and see pages upon pages of solid argument that they had, I am inclined to do, as I sometimes do, omit those questions from further argument.

I will overrule the objection. It is a question of what effect is to be given. This is received merely to show, not that licenses were granted, you see, but that exports were made of glucose during a certain period and month. Whether they were legal or illegal, or black market or allowed by the revolutionary government, as Mr. Louis Stanton inti-

(Testimony of G. Fred Berger.)

mated yesterday, we will decide later on; but this merely reveals the fact that they were made.

Mr. L. B. Stanton: For the sake of the record, your Honor, I do not think there is any necessity of copying all this thing into the record. But there is only one line——

The Court: If you identify it, merely to state what it shows, I will read it into the record. Which line?

Mr. L. B. Stanton: Each one has a heading. We have, for instance, this one here: “Glucosa—” thousands of kilos. [729]

The Court: 597.

Mr. L. B. Stanton: We are not interested in refined wheat or borax or any of the other matters, or the advertisement at the bottom of it. I would suggest, therefore, that the——

The Court: I think the easiest way is for someone to read them. If you indicate to me which one you are referring to? The one I have before me, as I read it, has a complete list here of persons.

Mr. L. B. Stanton: Yes.

The Court: Let us see.

Mr. L. B. Stanton: Many of them have not exported.

The Court (Counting): 28.

Mr. L. B. Stanton: Many of them did not export, you see.

The Court: You want this one, by the United States, or do you want the entire list? First, it says Ireland, Switzerland, Palestine, Peru, Venezuela.

(Testimony of G. Fred Berger.)

Mr. L. B. Stanton: I am perfectly willing to hear all of the matters on glucose, but when it refers to oil, Mani——

The Court: On the one as to which the witness——

Mr. Berger: This is——

The Court: Just a minute, please. Just a minute, please. When counsel talk, please do not interfere. [730]

On mine, which is the one which was shown to the witness, that one is crossed and it refers to glucose and has a complete list.

Mr. E. B. Stanton: Yes, sir.

The Court: And it shows imports and exports by some of these companies.

Mr. L. B. Stanton: For instance, what I am talking about you can see, your Honor, here it has other export matters than glucose.

The Court: Well, that is correct. This one has, too.

Mr. L. B. Stanton: I just thought for the sake of the record there was no use in putting in the other exports.

The Court: I will tell you, gentlemen, the rubric which contains “glucose” will have to be copied in its entirety.

Mr. L. B. Stanton: That is correct; that is correct.

The Court: Otherwise we will have to go through and pick out as to each one. So I think we can

(Testimony of G. Fred Berger.)

take these exhibits and mark the "glucose," and then they can set them up in the form of a table as they are here.

Mr. L. B. Stanton: That is right.

The Court: And that will indicate.

Mr. L. B. Stanton: The only thing I wanted to exclude is the wheat and meat, etc.

The Court: That is all right. How many of these have [731] you?

Mr. E. B. Stanton: There are six, your Honor.

The Court: Six of them, all right. We will have to give each a number. Only the portion which is marked with red pencil or in what they call in newspaper parlance "a box"—only the portion which is boxed will be received as an exhibit. We will give each a number in that portion and the portion will be transcribed.

The Clerk: That will be Plaintiff's Exhibit 64 in evidence.

The Court: All right. Let me identify it further. Let us take them in order. What I have said applies to this one, too. The portion boxed on the resume or synopsis which has the legend "June, 1946," will be given the first number.

The Clerk: That is Plaintiff's Exhibit 64 in evidence.

The Court: 64. Mr. Stanton, this one is split up. It does not run across the page. I want to be sure that I am not leaving anything out. You see, this does not run across the page.

(Testimony of G. Fred Berger.)

Mr. L. B. Stanton: Yes.

The Court: So this is merely the corner, the northeast corner from where I am standing looking at it. This is marked "July, 1946." That will be the next number.

The Clerk: Plaintiff's Exhibit 65 in evidence.

The Court: The portion marked on the exhibit which is the summary for August, 1946, will be given the next number.

The Clerk: Plaintiff's 66 in evidence.

The Court: The one of September, which is on the northwest corner of the summary, will be given the next number.

The Clerk: Plaintiff's Exhibit 67 in evidence.

The Court: The one dated October, 1946, will be received as the next one. That is the northeast corner.

The Clerk: Plaintiff's Exhibit 68 in evidence.

The Court: And the last one, which is a portion of the summary of November, 1946, that is the upper part of the page.

The Clerk: It is Plaintiff's Exhibit 69 in evidence.

Mr. E. B. Stanton: I do not know, for the record, whether I made the formal statement of offering them.

The Court: I have already received them. I presumed you offered them, and the portions boxed will be transcribed into the record.

(Plaintiff's Exhibits 64, 65, 66, 67, 68, and 69 read in words and figures as follows:) [733]

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 64

Resumen Mensual de Exportacion de Frutos del Pais de la Rep. Arg.—JUNIO 1946 No. 25

| Glucosa: miles de ks | U. S. A. | Irlanda | Suiza | Palestina | Peru | Venezuela | Totales JUNIO | De enero a 30 Jun. 46 |
|-------------------------|----------|---------|-------|-----------|------|-----------|------------------|--------------------------|
| Engenio Lang SRL. | 59.7 | — | 81.6 | 50.6 | — | — | 191.9 | 1064.8 |
| Crawford Keen & Co. | 54.2 | — | — | — | — | — | 54.2 | 884.3 |
| Sifar S. A. | — | — | 10.7 | — | 12.7 | — | 23.4 | 634.9 |
| Pablo Hadra & Cia. | — | 249.9 | 53.2 | — | — | — | 294.1 | 615.9 |
| Hirschberg S. A. | — | 129.6 | — | — | — | — | 129.6 | 206.5 |
| Sunney S. A. | — | — | — | — | — | — | — | 162.9 |
| J. Llop. | — | — | — | — | — | — | — | 160.4 |
| Bunge & Born | — | — | — | — | 4.2 | — | 4.2 | 143.6 |
| Auge Freres & Cia. | — | — | — | — | — | — | — | 133.0 |
| Tricontinenta SRL. | — | — | 32.4 | — | — | — | 32.4 | 130.4 |
| Irveco S. A. | — | — | — | — | — | — | — | 119.8 |
| A. Taubevischlag | 54.2 | — | — | — | — | — | 54.2 | 108.5 |
| R. Lili Galdenos | — | — | — | — | — | — | — | 65.5 |
| Engadina SRL | — | — | — | — | — | — | — | 65.1 |
| Dicomex SRL | — | — | — | — | — | — | — | 54.9 |
| Cont. Commoditis Arg. | 54.4 | — | — | — | — | — | 54.4 | 54.4 |
| La Plata Cereal Co. | — | — | — | — | — | — | — | 54.3 |
| Productiva SRL | — | — | — | — | — | — | — | 54.3 |
| M. Comero & Cia | — | — | — | — | — | — | — | 54.1 |
| F. C. Pedemonte | — | — | — | — | — | — | — | 53.8 |
| J. Coumantaros | — | — | — | — | — | — | — | 43.6 |
| Sudametal S. A. | — | — | — | — | — | — | — | 32.5 |
| Vegetolio Argent. | — | — | — | — | — | — | — | 27.8 |
| A. K. Hallo | — | — | — | — | — | — | — | 27.7 |
| Refineria de Maiz. | — | — | — | — | — | — | — | 3.9 |
| Quebracho Arg. SRL | — | — | — | — | — | — | — | 3.2 |
| Iudamtox SRL | — | — | — | — | — | 3.2 | 3.2 | 3.2 |
| | 222.5 | 370.5 | 117.9 | 50.6 | 16.9 | 3.2 | 841.6 | 4957.2 |

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 65

Resumen Mensual de Export de Frutos del Pais de la Rep. Arg.

JULIO de 1946

| Glucosa miles de kilos | Canada | Belgica | Total Julio | De enero a 31 jul. 946 |
|---------------------------|--------|---------|----------------|---------------------------|
| Eug. Lang SRL | — | — | — | 1064.8 |
| Crawford Keen & Co. | 54.2 | — | 54.2 | 938.5 |
| Pablo Hadra Ltd. | — | 54.2 | 54.2 | 670.1 |
| Sifar SA | — | — | — | 634.9 |
| Hirschberg SA. | — | — | — | 206.5 |
| Sonney SA | — | — | — | 162.9 |
| J. Llop | — | — | — | 160.4 |
| Bunge & Born | — | — | — | 143.6 |
| Auge Freres & Co. | — | — | — | 133.0 |
| Tricontinenta SRL | — | — | — | 130.4 |
| IWECO SA | — | — | — | 119.8 |
| A. Taubenschlag | — | — | — | 108.5 |
| R. Lili Galdenos | — | — | — | 65.5 |
| Engadina SRL | — | — | — | 65.1 |
| Dicomex SRL | — | — | — | 54.9 |
| Cont. Commoditis Arg | — | — | — | 54.4 |
| LaPlata Cereal Co | — | — | — | 54.3 |
| Productiva SRL | — | — | — | 54.2 |
| M. Comero & Co | — | — | — | 54.1 |
| F. C. Pedemente | — | — | — | 53.8 |
| J. Coumantaros SRL | — | — | — | 43.6 |
| Sudametal SA | — | — | — | 32.5 |
| Vegetolio Argentino | — | — | — | 27.8 |
| Algolan SRL | 26.8 | — | 26.8 | 26.8 |
| A. K. Halle | — | — | — | 21.7 |
| Refineria do Maiz. | — | — | — | 3.9 |
| Quebracho Arg. SRL | — | — | — | 3.2 |
| Sudamtex SRL | — | — | — | 3.2 |
| | 81.0 | 54.2 | 135.2 | 5092.4 |

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 66

| Glucosa : miles de ks | Irlanda | Suiza | U. S. A. | Totales— AGOSTO | De 1° enero a 31 Agosto 46 |
|--------------------------|---------|-------|----------|--------------------|----------------------------------|
| Sifar S. A. | 775.9 | — | — | 775.9 | 1410.8 |
| Eugenio Lang SRL | — | 21.8 | 43.9 | 75.7 | 1130.5 |
| Crawford Keen & Cia | — | — | — | — | 938.5 |
| Pablo Hadra & Cia | — | 84.0 | — | 84.0 | 754.1 |
| Hirschberg S. A. | 140.5 | — | — | 140.5 | 347.0 |
| Sunney S. A. | — | — | — | — | 152.9 |
| J. Llop | — | — | — | — | 160.4 |
| Bunge & Born | — | — | — | — | 143.6 |
| Auge Freres & Cia | — | — | — | — | 133.0 |
| Tricontinenta SRL | — | — | — | — | 130.4 |
| IWECO S. A. | — | — | — | — | 119.8 |
| A. Taubenschlag | — | — | — | — | 108.5 |
| R. Lili Goldanos | — | — | — | — | 65.5 |
| Engadina SRL | — | — | — | — | 65.1 |
| Dicomex SRL | — | — | — | — | 54.9 |
| Cont. Commoditis Arg. | — | — | — | — | 54.4 |
| La Plata Cereal Co. | — | — | — | — | 54.3 |
| Productiva SRL | — | — | — | — | 54.2 |
| M. Comero & Cia | — | — | — | — | 54.1 |
| F. C. Pedemonte | — | — | — | — | 53.8 |
| J. Coumantarros & Cia. | — | — | — | — | 43.6 |
| Sudametal S. A. | — | — | — | — | 32.5 |
| Vegetolio Argentino | — | — | — | — | 27.8 |
| Algolan SRL | — | — | — | — | 26.8 |
| A. K. Halle | — | — | — | — | 21.7 |
| Refinerfa de Maiz | — | — | — | — | 3.9 |
| Quebracho Arg. SRL | — | — | — | — | 3.2 |
| Sudamtex SRL | — | — | — | — | 3.2 |
| | 916.4 | 105.8 | 43.9 | 1066.1 | 6158.5 |

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 67

| Glucosa: miles de ks | USA | Total Setb. | De enero a 30 Set. 46 |
|-------------------------|-------|----------------|--------------------------|
| SIFAR S. A. | — | — | 1410.8 |
| Eug. Lang SRL | 178.5 | 178.5 | 1309.0 |
| Crawford Keen & Co. | — | — | 938.5 |
| Pablo Hadra Ltd. | — | — | 754.1 |
| Hirschberg SA | — | — | 347.0 |
| Sonny SA | — | — | 162.9 |
| J. Llop | — | — | 160.4 |
| Bunge & Born | — | — | 143.6 |
| Auge Freres & Co. | — | — | 133.0 |
| Tricontinenta SRL | — | — | 130.4 |
| IWECO SA. | — | — | 119.8 |
| A. Taubenschlag | — | — | 108.5 |
| R. Lili Galdanos | — | — | 65.5 |
| Engadina SRL | — | — | 65.1 |
| Dicomex SRL | — | — | 54.9 |
| Cont. Commoditis Arg | — | — | 54.4 |
| La Plata Cereal Co | — | — | 54.3 |
| Productiva SRL | — | — | 54.2 |
| M. Comero & Co. | — | — | 54.1 |
| F. C. Pedemonte | — | — | 53.8 |
| J. Coumantaros SRL | — | — | 43.6 |
| Sudametal SA | — | — | 32.5 |
| Vegetolio Arg. SRL | — | — | 27.8 |
| Algolan SRL | — | — | 26.8 |
| A. K. Halle | — | — | 21.7 |
| Refineria de Maiz | — | — | 3.9 |
| Quebracho Arg. SRL. | — | — | 3.2 |
| Sudamtex SRL | — | — | 3.2 |
| | 178.5 | 178.5 | 6337.0 |

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 68

| Glucosa : miles de ks | Suiza | Haifa | Total Octub. | De enero a 31 Oct. 46 |
|--------------------------|-------|-------|-----------------|--------------------------|
| Sifar S. A. | — | — | — | 1410.8 |
| Eug. Lang SRL | — | 52.6 | 52.6 | 1361.6 |
| Crawford Keen Ltd. | — | — | — | 938.5 |
| Pablo Hadra & Cia | 54.6 | — | 54.6 | 808.7 |
| Hirschberg S. A. | — | — | — | 347.0 |
| Sonny S. A. | — | — | — | 162.9 |
| J. Llop | — | — | — | 160.4 |
| Bunge & Born | — | — | — | 143.6 |
| Auge Freres & Cia | — | — | — | 133.0 |
| Tricontinenta SRL | — | — | — | 130.4 |
| IWECO S. A. | — | — | — | 119.8 |
| A. Taubenschlag | — | — | — | 108.5 |
| R. de Lili Galdano | — | — | — | 65.5 |
| Engadina SRL | — | — | — | 65.1 |
| Dicomex SRL | — | — | — | 54.9 |
| Cont. Commoditis A | — | — | — | 54.4 |
| La Plata Cereal C | — | — | — | 54.3 |
| Productiva SRL | — | — | — | 54.2 |
| M. Comero & Cia. | — | — | — | 54.1 |
| F. C. Pedemonte | — | — | — | 53.8 |
| J. Coumantaros & c. | — | — | — | 43.6 |
| Sudametal S. A. | — | — | — | 32.5 |
| Vegetolio Arg. SRL | — | — | — | 25.8 |
| Algolan SRL | — | — | — | 26.8 |
| A. K. Halle | — | — | — | 21.7 |
| Refiner. de Maiz | — | — | — | 3.9 |
| Quebracho Arg. SRL | — | — | — | 3.2 |
| Sudamtex SRL | — | — | — | 3.2 |
| | 54.6 | 52.6 | 107.2 | 6444.2 |

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 69—(Continued)

| Glucosa; miles de ks | USA | China | Irlanda | Venezuela | Peru | Sulza | S. Africa | Totales | Del 1° enero a 30 Nov. 46 |
|-------------------------|-------|-------|---------|-----------|-------|-------|-----------|---------|---------------------------------|
| Dicomex SRL | — | — | — | — | — | — | — | — | 54.9 |
| Cent. Commoditis A | — | — | — | — | — | — | — | — | 54.4 |
| La Plata Cereal C. | — | — | — | — | — | — | — | — | 54.3 |
| Productiva SRL | — | — | — | — | — | — | — | — | 54.2 |
| M. Comeró & Cia. | — | — | — | — | — | — | — | — | 54.1 |
| F. C. Pedemonto | — | — | — | — | — | — | — | — | 53.8 |
| J. Coumantaros & Cia. | — | — | — | — | — | — | — | — | 43.6 |
| Sudametal S. A. | — | — | — | — | — | — | — | — | 32.5 |
| Irsa S. A. | — | 33.3 | — | — | — | — | — | 33.3 | 33.3 |
| Vegetolio Arg. SRL | — | — | — | — | — | — | — | — | 27.8 |
| Algolan SRL | — | — | — | — | — | — | — | — | 26.8 |
| A. K. Halle | — | — | — | — | — | — | — | — | 21.7 |
| J. Siccardi | — | — | — | — | 9.8 | — | — | 9.8 | 9.8 |
| J. C. Basombio | — | — | — | — | 5.6 | — | — | 5.6 | 5.6 |
| S. Wolff | — | — | — | — | 5.2 | — | — | 5.2 | 5.2 |
| Refiner de Maiz | — | — | — | — | — | — | — | — | 3.9 |
| Quebrach Arg. SRL | — | — | — | — | — | — | — | — | 3.2 |
| Sudamtex SRL | — | — | — | — | — | — | — | — | 3.2 |
| | 352.5 | 335.8 | 135.9 | 111.6 | 102.1 | 43.5 | 15.4 | 1096.8 | 7541.0 |

(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, calling your attention to this first exhibit, Plaintiff's Exhibit 64, June, 1946, to the part enclosed in the red box, the column on the left indicates what?

A. Indicates the exporters.

Q. And the first column "U.S.A." indicates what?

A. Those amounts shipped——

Mr. Bronson: I think the record is the best evidence, if your Honor please. It is interpolation. If it does not say that, then it is his addition.

Mr. E. B. Stanton: Well, the names.

Mr. Bronson: I make an objection to the document being——

The Court: Gentlemen, there is no use of taking time. We know Spanish just as well as Mr. Berger. We probably can translate better because we read it, too. I mean all of us combined here. So there is no use to have him interpret for us because this speaks for itself.

The first column says "Glucose." I will put it into the record and see if it is not a correct summary. The title of each of these, taking the title of the first exhibit 64, is "Monthly summary of exports of fruits from the Republic of Argentina." They say "from the country of the Republic," "del Pais," et cetera. "June, 1946, No. 25."

The first column says "Glucose:—thousands of kilos." [747] Then the next column is "U.S.A.—Ireland—Switzerland—Palestine — Peru — Venezuela." Then follows "Total for June," and the

(Testimony of G. Fred Berger.)

last column is "from January to 30th of June, 1946."

Then under the first column "Glucosa:—" is a list of the dealers or persons. We will take one. And then along the second line at the top, under the proper rubric, shows "Destination of export."

We will take one which seems to have the largest number of figures on the list. "Eugenio Lang S.R.L." under "U.S.A." they have "59,7"; under "Ireland" they have nothing; under "Switzerland" they have "81,6"; under "Palestine" they have "59,6"; under Peru they have nothing; under "Venezuela" they have nothing; under "Total" they have "June—191,9;" under the last rubric "from January to 30th of June, 1946" they have "1064,8."

Some of them have nothing. We will take the next one, No. 4 down the line, because it has larger amounts. It is "Pablo Hadra & Cia." On the United States, the United States is blank; "Ireland—240,9;" "Switzerland"—53,2; "Palestine" nothing; "Peru" nothing; "Venezuela" nothing; "Totals for June 294,1;" "Total from January to 30th of June '46—615,9," and the others are smaller. That is the legend. I think that ought to suffice without any further interpretation.

Mr. E. B. Stanton: I think that is all. If the court [748] please, it is possible we may wish to put Mr. Whipple on, if we could have our morning recess.

The Court: You have not finished with this witness yet.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: I have finished with this witness.

The Court: I know, but counsel has not.

Mr. E. B. Stanton: I am sorry.

The Court: Counsel has not, and I want to finish with the witness.

Cross-Examination

By Mr. Bronson:

Q. With respect to that three-way telephone call of which you fixed the date as approximately July 12th, you and Mr. Dichter in South America, and Mr. Metcalf in the United States, did you read the deposition of Mr. Metcalf on that subject? A. Yes, sir.

Q. I won't read it to refresh your mind. Going back——

The Court: Where are you reading from?

Mr. Bronson: Mr. Metcalf's deposition.

The Court: I know, I have it. What page?

Mr. Bronson: Page 28.

The Court: What line?

Mr. Bronson: They are not numbered. It is right in [749] the middle of the page.

The Court: Oh, I forgot these New York reporters. This is a New York reporter, isn't it? That is right. I don't understand why a metropolitan area like that should have this system. We have a lot of trouble. We try a lot of patent cases and trade mark cases and we have al-

(Testimony of G. Fred Berger.)

ways the same trouble. I do not know why they do not require them to number their pages.

(Discussion between court and the reporter off the record.)

The Court: Give me the place again.

Mr. Bronson: "Going back to the cable that I read" in the middle of page 28.

The Court: "Going back to the cable," all right; that is where he is reading.

Q. (By Mr. Bronson): "Going back to the cable that I read to you signed 'Engraw Dichter Berger,' under date of July 8, 1946, did you have a telephone conversation jointly with Mr. Dichter and Mr. Berger in which you stated that you were satisfied to leave the question of liquidation or cancellation in their hands together with Dr. Goytia, who then represented Schenley in Argentina?"

"The answer is no.

"Q. You did not?"

"A. No, I had no authority to, and if I had, the thing [750] would probably have been liquidated in accordance with——

"Q. In accordance with what?"

"A. With their judgment, because that was what they asked us to do, to rely on their judgment to liquidate this thing."

Now, having read that, is it your statement that Mr. Metcalf incorrectly answered that when he said "no."?

A. It is definitely my statement.

(Testimony of G. Fred Berger.)

Mr. Bronson: All right. That is all, Mr. Berger.

The Court: All right, you may step down. We will take a short recess and then we will hear any further testimony, and then I will make the proper arrangements for the remainder of the depositions.

(Short recess.) [751]

The Court: All right, gentlemen.

Mr. E. B. Stanton: The plaintiff will now introduce, by stipulation of counsel, a telephone bill to Mutual 4371, which is the telephone number of Harold Whipple Company, bearing a record of toll charges to that telephone from May 10th, 1946, through June 5th the same year. For the purpose of the record, the only calls that have any bearing on the case are the calls reported to San Francisco from May 20th through June 5th, and it is further stipulated that all such calls were made by Mr. Whipple to the Schenley Corporation in pursuance of the transaction involved in this case.

Mr. Bronson: It is so stipulated.

The Clerk: Admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 70 in evidence.

Mr. E. B. Stanton: Now, your Honor, the plaintiff rests.

(Whereupon the plaintiff rested its case.)

Mr. Bronson: We have rested, except for the additional testimony coming from South America.

The Court: All right, gentlemen.

Mr. Bronson: But before doing so, I have this matter stipulated to——

Mr. E. B. Stanton: Oh, yes.

Mr. Bronson: ——explanatory of the plaintiff's introduction in the testimony of a conversation between Mr. [752] Whipple and Mr. Baglin, I read by agreement of counsel a short excerpt of a deposition of Mr. Whipple taken in Los Angeles on July 1st, 1947, at page 16, between lines 6 and 15, reading in this wise:

“A. I would like to interrupt here to interpolate that, in hearing this testimony, that we are talking about a series of telephone conversations that occurred, a number of them, backwards and forwards, over a period of several days, and several exchanges, of course, on my part, of cablegrams with my principals and I will not be held to the accuracy, of the exact date or of the sequence of the telephone calls between the San Francisco office of Schenley and myself, nor to the exact principals, whether it was Mr. Baglin or Mr. Donnelly with whom I talked following the first conversation.”

That ends it.

Mr. E. B. Stanton: There does remain as part of the plaintiff's case the testimony, as we stated yesterday, of Juan Lang, who will be available in Los Angeles on the 9th of June, having to come up from South America. The defendant's counsel have agreed to have his testimony either in court or by way of deposition, whichever the Court would

suggest on that matter, and it is understood that his testimony is to be by way of rebuttal. And I further understood the Court to state, in view of what we claim as the surprise [753] of these depositions, that after the arrival of the further South American depositions of the defendant, that upon petition to the Court, that he would give us the opportunity of further rebuttal evidence by deposition.

The Court: Just one minute. Just a minute.

Now, gentlemen, is the date of the arrival of this gentleman certain?

Mr. E. B. Stanton: I have a telegram which I will show the Court, which I received from him.

(Mr. E. B. Stanton hands telegram to the Court.)

The Court: Just a minute. I have to consult my calendar. In view of the fact that there are so many depositions and, gentlemen, our eyes take a terrible beating, as you all know, and the reading of depositions is a task and we can't take time off—and I always rely upon week ends; in fact, as a rule, I do not hold court on Saturday and even that does not always apply, because one of us has to be here on Saturday, because we never leave this District without someone being present to take care of emergency matters—and there is a large number of depositions here, I think it would be much more satisfactory, as long as the gentleman is here, if it is conducted in open court.

Mr. E. B. Stanton: All right.

The Court: The man speaks English, or will you need an interpreter, do you know? [754]

Mr. L. B. Stanton: He speaks English.

Mr. E. B. Stanton: He speaks English, yes.

The Court: Suppose we set it for 2:00 o'clock Wednesday afternoon. He does not give the hour of his arrival. Then if I am in the midst of a trial, I will merely give counsel the afternoon off. I have cases that will probably be tried.

Mr. E. B. Stanton: I do not anticipate that his testimony should take in excess of half or three-quarters of an hour for the direct and cross examination.

The Court: Well, if you want to come in later in the afternoon, I will make it 3:00 o'clock. I don't care. You know I don't look at the clock.

Mr. E. B. Stanton: Yes. Well, 3:00 o'clock or 2:00 o'clock.

The Court: Whatever counsel say.

Mr. Bronson: It is agreeable to us at either hour on that day.

The Court: Let us make it 3:00 o'clock, then.

Mr. Bronson: All right.

The Court: And if I am in the midst of a trial, I can go ahead from 1:00 o'clock to 3:00 o'clock and then probably conclude the matter or give counsel the benefit of the hour.

Then, the further proceedings in the matter will be continued until Wednesday, the 9th of June, at the hour of 3:00 o'clock p. m.

I will not make any order at the present time about the waiting time for the other depositions in time for argument. We will see. Perhaps they will arrive before that time. [755]

Mr. L. B. Stanton: I doubt it, your Honor, because I understand they haven't been taken yet.

The Court: They haven't been taken yet?

Mr. Bronson: Well, that is the suggestion from the information that we had, that they would arrive——

Mr. L. B. Stanton: You see, on those depositions that have to arrive at a time convenient for the Argentine court to hear them.

The Court: Well, being Latin Americans, they don't have this "drive" that we have. They take their lives leisurely.

Mr. L. B. Stanton: I understand, at the same time they do have to get some time to get in on it, in court.

The Court: That is not a criticism. That is an admiration of philosophy, if a person can practice that kind of living. I have always said I could enjoin leisure in several languages. From what I learn about counsel in this case, I think they could enjoin leisure in several languages, also, but we don't get much of it.

But, gentlemen, at any rate, let us not agree at the present time. We will wait and see and we will again talk things over. I will tell you what my suggestion is: I have already indicated to you that unless the entire testimony is complete this month, there won't be a likelihood of the matter coming to a close soon, unless I declare this an emergency matter and set it for some time in July and interrupt my work up there in the Northern District

of California. I have referred several times to the fact that way back in March or in February of this year I promised Judge Roche the senior judge of the Northern District, that I would spend the month of July up there, presumably trying another antitrust case, but even if that antitrust case is continued for some reason, although I have heard it is actually set for the 6th of July, I have agreed nonetheless to assist them during that month, because they are one judge short—and if you have read a recent decision of the Supreme Court, that came out last week on habeas corpus, where they say we can't deject a habeas corpus application, even if it is made a fourth or fifth or sixth time, if the man strikes upon a new point and just states that he has a new point, I think they will probably need one or two more judges up there, due to the number of habeas corpus proceedings they have to handle there. It is a problem that can't be met. They tried to meet it in some way and the Supreme Court did not approve of it, at least five of the judges didn't. And so they need assistance and I am always glad to help them, because they help not specifically me, but the court of which I am a member. I never ask to trade work when I go somewhere else. I never ask anyone to come down here and take my place, but situations have arisen where we need assistance and they have come here, and so have other judges of the Ninth Circuit. Their business is our business and we have agreed to help them whenever they call on us. [758]

However, my thought is to trail this not later

than the last day of June until some Monday, when it could be completed and then by that time, if it isn't, then we will determine at that time what to do. I don't want to lock this case up. If I take into consideration the time I will spend in San Francisco, assuming that the case doesn't last longer than a month, and counsel have already frightened me by saying that it might, because it is a civil antitrust case involving damages, and of course I don't even know whether it is a jury case or a non-jury—the counsel in the other case I just finished, before I started this, seem to know more about it because some of their San Francisco associates are in that case also—so even if I don't finish that, our vacation month is always August, and I think you heard me say that as long as our judicial conference this year is to be held in Seattle and the American Bar Association meeting follows us, I thought that I would, for the first time in my life after 20 years' membership in the American Bar Association, attend a meeting away from home—the only one which I attended was many years ago when they met in Los Angeles—which means that I will not be back for trial work until the middle of September. And I don't want to lock this case up for that length of time. So I am leaving it flexible to determine, not exactly from day to day, as between next week and the end of the month what we are going to do. In the meantime, I would suggest to counsel that they urge their correspondents to endeavor to secure the taking of the depositions as soon as possible.

Mr. Bronson: We will do that. We will do that.

The Court: And if you have some idea when they will be here, I would be willing to arrange to break the work there and take some week end and come down here, either some end of the week, on Friday, or some Monday, and take care of the matter, because when I am up there I hold court five days instead of four, because I have no calendar there. Of course, that Monday calendar is not always observed. We have court on Mondays. On this last Monday I merely found out that there were no law and motion matters of importance and I made arrangements to get rid of them. I am merely telling you that so that you will know the situation.

In the meantime I will try to bring myself up to date with the depositions that are in the record.

I have already made the order continuing further proceedings and the rest of it was merely the expression of my views as to the possibilities, so that you will know what I have in mind and to suit your own convenience and the desires of you all and my desire that we, having started this case, complete it as quickly as possible. And the time, I will fix, for the additional testimony and of course also time for oral argument that you gentlemen present. I prefer oral argument and if at the conclusion of the oral argument, some question arises on which I feel briefs should be filed, I will determine that at the time.

I think that an oral argument, particularly citation of authorities, whether you give me a list of them or have it transcribed, serves all practical purposes, and for one reason, as I have always said, that I can't ask questions of a cold brief, but I can ask questions of counsel who makes an oral argument so as to clarify my own thoughts and give them an opportunity to correct me if I have any misapprehension of the facts or of the law which is applicable.

So with that understanding, gentlemen, the Court will recess.

I will return this telegram to you, Mr. Stanton.
Mr. E. B. Stanton: Thank you.

(And thereupon, at the hour of 12:00 o'clock noon on Friday, June 4, 1948, the further hearing of said action was continued until Wednesday, June 9, 1948, at the hour of 3:00 o'clock p.m.) [761]

PLAINTIFF'S EXHIBIT 61

In the District Court of the United States for
the Southern District of California, Central
Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

Plaintiff's Exhibit 61—(Continued)
(Deposition of Horacio Beccar Varela.)

INTERROGATORIES

Deposition of Horacio Beccar Varela (Hijo), taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 10 a. m. on November 26, 1947, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Horacio Beccar Varela, did well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories were put to him in the English language.

The answers of the witness, Horacio Beccar Varela, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Horacio Beccar Varela, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Horacio Beccar Varela of Pena 2366, Buenos

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

Aires, Argentina, lawyer, 40 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Horacio Beccar Varela
To Interrogatories

To the First Interrogatory, he says:

My name is Horacio Beccar Varela (Hijo), 40 years of age. Residence: Pena 2366, Buenos Aires, Argentina. Occupation: Lawyer.

To the Second Interrogatory, he says:

I have been a lawyer since 1929 and I have practiced my profession in the City of Buenos Aires in general practice attending matters of all kind related to the law. I belong to the law office called Estudio Beccar Varela, which was founded by my father in the year 1897, which has offices in Bartolome Mitre 430, Buenos Aires, Argentina.

To the Third Interrogatory, he says:

I attended the primary school and secondary school at the Colegio Marin in the City of San Isidro, Province of Buenos Aires; then I attended the law school at the University of Buenos Aires, where I obtained my degree as a lawyer, in August, 1929. I was admitted to the Bar shortly afterwards. I have never held, nor hold at present any gov-

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

ernment position, and in the practice of my profession I have acted as lawyer for the National City Bank of New York since 1930 and have also advised and intervened in law cases for many other American, English and Argentine firms, engaged in commerce, or with industries established in this country. I have also had a considerable experience in international trade due to my intervention in matters related thereto and interesting some of my clients, including sales of personal property to firms abroad, such as for instance those made by the Frigorifico Anglo (Anglo Meat Packing Company) and other exporters.

To the Fourth Interrogatory, he says:

Law No. 12,591 and No. 12,830 (incorrectly stated in the interrogatory as Law No. 12,831, as said law No. 12,831 does not refer to the subject matter of this interrogatory), were approved by the National Congress and promulgated respectively under dates of September 8, 1939, and August 23, 1946; law No. 15,591 does not exist, as the last numbers of the laws enacted up to the present are between 13,000 and 13,100. I attach as Exhibit "A" a copy of law No. 12,591, and as Exhibit "B" the copy of law No. 12,830. These two laws were published in the Official Bulletin issued daily by the government, respectively under dates September 11, 1939, and September 16, 1946, which in accordance with numerous decisions of our Courts is considered the official publication and the true text of all laws

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

sanctioned by the Argentine Congress. In this connection I quote the authority of the Annotated Civil Code published by Dr. Busso, page 16. I cannot attach at this moment a copy of the respective issues of the Boletin Oficial, because upon inquiry I found that they are exhausted. I have not been able either to obtain the attestation of the attached copies by any government official. As regards the regulations and orders passed and made under the above-mentioned laws No. 12,591 and No. 12,830 there are so many that have been issued at different times without publication in the Official Bulletin, that to obtain a full set of copies thereof would be a very difficult and lengthy task. I may say, however, that no one of those decrees, regulations and/or orders, except those which I will mention later on, refers to the export of glucose. As laws No. 12,591 and No. 12,830 have as principal object to establish a system of maximum prices for consumer articles and they provide for an enumeration of the articles to be included to be made by Executive Power, the latter has issued most of the decrees relating to these laws to fix the maximum prices for sale of all kinds of articles, food stuffs, drinks, home appliances, etc., but it has not done so with regard to glucose. On the other hand, article 14 of law No. 12,591 and article 2, paragraph 4 of law No. 12,830 authorize the Executive Power to limit or prohibit entirely the export of certain commodities as required by the needs of

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

the country. In the exercise of this faculty the Executive Power has from time to time issued decrees or regulations with regard to many raw materials and finished products, but no one of them refers to glucose. I shall mention later in this deposition some regulations of the Secretary of Industry and Commerce which specifically refer to glucose permitting its exportation under conditions which do not imply any prohibition or restriction. As to the dates when each of the above laws went into effect in accordance with the provision of article 2 of our Civil Code, (as currently interpreted by our Courts, see: decision of the First Civil Court of Appeals of September 4, 1933, 43 J. A. (Jurisprudencia Argentina) 543; 2nd Civil Court of Appeals, September 27, 1933, 108 Gaceta del Foro 203), said date is that of the respective publication. Law No. 12,591 was in force therefore as from September 11, 1939, until the date of publication of law No. 12,830, which by virtue of its article 19 repealed and substituted entirely the previous one. Law No. 12,830 is in force as from September 16, 1946, and in accordance with what is stated in article 19 thereof shall be so in force until June 3, 1952.

To the Fifth Interrogatory, he says:

As mentioned, I have found no legal provision, regulation or order prohibiting the export of glucose during the year 1946 or during this 1947. The export of all kinds of products is currently subject

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

to the obtention of an administrative permit from the Secretary of Industry and Commerce and with regard to glucose two regulations were issued by this Secretary concerning the conditions upon which said permits would be granted. Under date of August 29, 1946, a resolution No. 6926/46 was issued stating the total quantities of glucose that may be exported and establishing certain conditions to be fulfilled in the application for the respective export permits. A few weeks later this resolution was repealed and replaced by resolution No. 7499/46 issued on September 12, 1946, by virtue of which, in view of the change occurred in the situation of the glucose market, where it was verified that production had increased considerably while consumption only very slightly, the maximum limit fixed for exports in the previous resolution was annulled and free exports were permitted after the local needs had been fulfilled. I attach copies of the two resolutions of the Secretariat of Industry and Commerce which I have mentioned in the answer to interrogatory No. 5, marked respectively "C" and "D."

To the Sixth Interrogatory, he says:

I have not found any interpretation of the laws and regulations with respect to export licenses made by any of the Courts, executive or administrative offices of the Argentine Republic relative to the grant or procurement of said export licenses during the period of this contract, except the resolutions

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

of the Secretariat of Industry and Commerce which I have mentioned in my answer to interrogatory No. 5.

To the Seventh Interrogatory, he says:

This question does not require an answer in view of my answer to interrogatory No. 6.

To the Eighth Interrogatory, he says:

In my opinion, under Argentine law, the purchase contract covered by a letter copied in Exhibit "A," which I have examined, is perfectly valid both as to its form and as to the provisions it contains. As a private contract, by virtue of article 1012 and et seq. of the Civil Code, as well as articles 1144 and 1147 of the same Code, an agreement in writing accepting a proposal of sale, as that which is contained in the document in question, is valid and binding on both parties to it. Mention may be made also of article 207 and article 208 of the Code of Commerce which make specifically applicable to commercial matters the above-mentioned provisions of the Civil Code. The conventions contained in the document in question furthermore do not fall within the prohibitions of article 499 of the Civil Code concerning obligations assumed without a proper cause or consideration, neither within article 502 of the same Code which declares null and void obligations or undertakings contrary to the laws or to the public order. There has not been in this case as explained, any force

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

mayeur such as would exempt the parties from complying with their obligations under the provision of article 513 of our Civil Code. No practical impossibility to export the glucose or to pay its price existed that I know of; no legal prohibition existed either, as has been explained here above. In this latter connection it may be mentioned that our Courts have declared in several cases that prohibitions to export are not per se to be considered as constituting a force mayeur, unless directly related to the merchandise which is the object of the contract (Commercial Court of Appeals of the Federal Capital, *Gaceta del Foro*, volume 29, page 5; volume 24, page 314). In the case under consideration, in which a F.O.B. sale had been agreed, the seller was supposed to obtain whatever export permits may have been necessary and place the merchandise on board the carrying vessel. As there was no legal objection to obtaining such export permit I am of the opinion that the Plaintiffs were able to comply with their obligations under the contract with the Defendants at the times therein specified. Our laws do not specifically deal with the C.I.F., F.O.B. and F.A.S. clauses, but our Courts have had many opportunities to examine them and give to them the value and purport generally accepted in business practice in this country and universally, on the basis of which I have made the foregoing statement. See in this respect decisions of the Commercial Court of Appeals, published in *J. A. (Jur-*

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

isprudencia Argentina) volume 26, page 303 and volume 29, page 773.

To the Ninth Interrogatory, he says:

I believe I have given already the reasons for my answer to interrogatory No. 8 and quoted the decisions of the Argentine Courts related thereto.

To the Tenth Interrogatory, he says:

In Argentina a law is passed by the National Congress or by the State Legislatures, then promulgated by the respective Executive Power and published, which makes it obligatory for all inhabitants. A decree is issued by the Executive Power either National or of a Province (States) for the purpose of applying, interpreting or regulating the application of a law. A resolution or order may be issued by any of the departments that compose the Executive Power, sometimes called Ministries, sometimes Secretariats. This opinion is based on my knowledge of the Argentine Constitution and the laws issued thereunder providing for the way in which the Executive Power functions. As regards the provincial laws and decrees, similar constitutional provisions and laws apply in the case of each province.

To the Eleventh Interrogatory, he says:

By virtue of the provision of article 67, paragraph 2 of our Constitution, decrees, regulations or orders of the Executive Power must never contradict any provision of a law or go beyond what

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

said law permits. Under article 31 of the same Constitution, the provisions of the Constitution and of the laws sanctioned thereunder shall prevail in case of conflict with any provision of a Provincial Constitution or laws or in any other case of a similar nature. Our Courts have in innumerable cases declared null and void decrees and resolutions of the Executive Power that under the pretext of interpretation or clarification of the law modified its provisions. See among others: Decision of the National Supreme Court, published in *Jurisprudencia Argentina* 1945, volume 1, page 271; Federal Court of the Federal Capital, in *Jurisprudencia Argentina* 1944, volume 2, page 396; Second Civil Court of Appeals of the Federal Capital, *Jurisprudencia* 1945, volume 3, page 424, etc.

To the Twelfth Interrogatory, he says:

Existence of the telegram mentioned in this interrogatory does not alter the opinions given by me hereto, for as in accordance with article 1150 of our Civil Code offers can only be withdrawn when they have not yet been accepted, and article 1154 of the same Code states that once the acceptance to an offer has been sent to the other party, the deal is closed. Articles 1197 and 1198 of the Civil Code state that the obligations and agreements contained in a contract are for the parties thereof a rule to which they must adhere as to the law itself. This applies to purchase and sale con-

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

tracts as well as all others, by virtue of article 1323 et seq. of the Civil Code, also applicable to commercial matters as per the provision of articles 207 and 208 of the Code of Commerce, which I have mentioned above. Article 1200 of the Civil Code permits both parties to the contract to cancel it by mutual agreement, but lacking the consent of the other party no one of them can decide such cancellation. Among many cases decided by our Courts which have reaffirmed these principles, I can quote two of the first Civil Court of Appeals, published in *Jurisprudencia Argentina* volume 1, page 381, and volume 24, page 919; also two of the National Supreme Court, published in *Jurisprudencia* volume 5, page 491, and volume 28, page 310.

To the Thirteenth Interrogatory, he says:

I believe I have given already the reasons for my answer to interrogatory No. 12 and quoted the decisions of the Argentine Courts relating thereto.

/s/ H. BECCAR VARELA

HORACIO BECCAR VARELA,
Witness.

/s/ JONES R. TROWBRIDGE,

Consul of the United States
of America.

(Exhibits "A," "B," "C," and "D," attached to the foregoing testimony of Horacio Beccar Varela, being in Spanish, have not been copied.)

PLAINTIFF'S EXHIBIT 62

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES

Deposition of Alberto Padilla, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 3:30 p.m. on November 26, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above-entitled cause.

It appearing that the witness, Alberto Padilla, could not intelligently testify in the English language, one Constantino Ramos, of Avda. R. Saenz Pena 760, Buenos Aires, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the English and the Spanish languages and that you will truly and impartially interpret the oath to be administered and interrogatories to be asked Alberto Padilla, a witness, now to be examined, out of the

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

English into the Spanish language, and that you will truly and impartially interpret the answers of the said Alberto Padilla and reto out of the Spanish language into the English language. So help you God.”

and said Constantino Ramos interpreted accordingly.

The answers of the witness, Alberto Padilla, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Alberto Padilla, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Alberto Padilla, of Avda. R. Saenz Pena 760, Buenos Aires, Argentina, lawyer, 48 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories [776] now to be put to you. So help you God.”

deposes and says:

Answers by Alberto Padilla to Interrogatories

To the First Interrogatory, he says:

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

My name is Alberto Padilla, 48 years of age. Residence: Avda. R. Saenz Pena 760. Occupation: Lawyer.

To the Second Interrogatory, he says:

I have been practising my profession as a lawyer since 1940 in Buenos Aires. I am a lawyer for the First National Bank of Boston and many other commercial institutions.

To the Third Interrogatory, he says:

I have graduated as doctor in jurisprudence of the National University of Buenos Aires. I have been admitted to practice by the Court since April 1920. I have been a professor of the law school until 1946. I have been a director of the Instituto Movilizador de Inversiones Bancarias, an official agency created jointly with the Central Bank at the same time for the liquidation of banking assets.

To the Fourth Interrogatory, he says:

Statute No. 12,591 was promulgated on September 8, 1939. Article 14 authorizes the Executive Power "to restrict or prohibit the export of merchandise when the needs of the country so require and for the purposes of the present statute." The statute did not establish its term of [777] expiration, but was temporary because it is an emergency statute. (Article 19.) Article 14 of the statute No. 12,591 authorizes the Executive Power to prohibit or restrict exportation of the articles referred to in this statute. Decree No. 16,216 of June 3, 1946, added

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

to the article 14 of the statute No. 12,591, the penalties to be applied for violation of this article and also says that "the Secretaria de Industria y Comercio will regulate the conditions of applications of the present article, applying meanwhile the regulations in force." Statute No. 12,830 (incorrectly stated in interrogatory No. 12,831) was promulgated on August 23, 1946, to be in force until 1952. Its article 2 authorizes the Executive Power "to prohibit or restrict the exportation of products or merchandise when it is so required by the need of the country." There is no such statute as No. 15,591. Statute No. 12,591 in its article 1 refers to the food stuffs, in other articles refers to merchandise and products. The decree implementing this law uses the following words: "The products subject to the establishment of prices." Statute No. 12,830 refers to raw materials, manufactured articles, location of operations, or products of any nature destined for food. In none of these statutes is glucose specifically mentioned as an article whose exportation is prohibited. By decree No. 34,683 of December 31, 1945, published at the Boletín Oficial of January 10, 1946, with [778] the purpose of "ensuring to the people a normal supply," it is said: "Article 1: As from the date of the present decree, exportation of articles of prime necessity will be subject to the system of previous permits. Article 2. The Secretaria de Industria y Comercio "authorizes to issue the corresponding permits when the needs of

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

the internal consumption and the provision emerging from the second paragraph are ensured.”

Article 3: It is also entrusted to said Secretaria the making up of the list of products and articles to which article 1 refers, which will be communicated to the Direccion General de Aduanas to take the pertinent measures.” The Secretaria by means of the resolution No. 2,209 of March 11, 1946, gave a list of articles of prime need; glucose does not appear among them. In March 23, 1946, other articles were added to the list and glucose does not appear there either. (Anales de Legislacion, 1946, pages 691 and 693.) It is only with resolution No. 6926/46 of August 29, 1946, that the Secretaria takes account of glucose to be included among the articles to which decree No. 34,683 refers. It is fixed at 4000 tons the exportable quota of glucose for the period between July 1st and December 31st, 1946. It is established that the permits “will be granted after proof of the exporters that they themselves have delivered for the internal consumption a quantity double to that for which they seek exportation. This resolution was in force until September 18, 1946, in which [779] date a new resolution No. 7499/46 was given, “according to which exportation of glucose will remain submitted to previous permits which will be granted as soon as the domestic requirements are covered.” From these references it is clear that exportation of glucose has not been prohibited, on the contrary it was

Plaintiff's Exhibit 62—(Continued)
(Deposition of Alberto Padilla.)

allowed, always provided that a previous export permit should be granted by the Secretaria de Industria y Comercio, which it only did under already mentioned conditions.

To the Fifth Interrogatory, he says:

We have not found other laws or rules than the ones mentioned in the previous answer.

To the Sixth Interrogatory, he says:

I have not found any decision of the Courts or resolutions of an administrative authority with interpretations referring to the granting of export permits. Referring to this and the previous answer I should mention that I have made a very thorough investigation of all laws, decrees, regulations and Court decisions.

To the Seventh Interrogatory, he says:

It is answered by the preceding answer.

To the Eighth Interrogatory, he says:

According to the terms of the letter of May 23, 1946, the delivery dates for glucose are between June and December 1946. I do not find any legal obstacle to fulfil the contract [780] in those months, since an export permit could be requested from the government.

To the Ninth Interrogatory, he says:

As for article 888 of our Civil Code "the obligation is extinguished when the object becomes physically or legally impossible without fault of the

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

debtor.” This article is complemented by article 953 which says: “The object of the legal transaction must be things that are in commerce or that by a special reason it is not prohibited that they be object of some lawful transactions. Transactions which are not made in accordance with this disposition are null and void as they are considered as not having any object.” On the other hand articles 2336 and 2338 of the same Code say that all things are in commerce whose alienation is not expressly prohibited or depending on a public authorization, declaring as out of commerce all those that are absolutely or relatively inalienable. Among these listed ones are those “which need a previous authorization for its alienation.” In this case a previous authorization has not been requested at any moment as to sale. For this reason I understand that the contract has always been in force relating to its object and that the legal impossibility to fulfil it can only be established by prohibition of the export permit. From this prohibition a frustration would have emerged that would have exempt the payment of damages because of breach of [781] contract. Article 514 of the Civil Code has a foot note of the codifier in which it is said that “cases of force majeure are deeds of men, as war, deeds of the sovereign or the will of the princes. Deeds of the sovereign are those acts emerging from its authority intended to diminish the rights of the citizens.” Exertion of the authority of the State, prohibiting

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

export permits will thus in this case be an example of force majeure.

To the Tenth Interrogatory, he says:

According to the Constitutional System in the Argentina Republic, a statute is preeminent to a decree which can only implement the corresponding statute without altering its meaning. (Article 86, inc. 2nd of the Constitution.) A statute, according to the Constitution is passed by the Legislative Power, consisting of a Senate and a Chamber of Deputies, while the decree is issued by the Executive Power. Resolutions or orders are issued by a Minister or head of a department and are subordinate to a decree which is issued by the President and one Minister. Since June 4, 1943 up to June 4, 1946, the de facto Government issued the so-called decree-laws which had been in force as law.

To the Eleventh Interrogatory, he says:

In case of a conflict, ministerial resolution will subordinate to a decree and a decree to a law. Article 31 of the Constitution says that the Constitution and the [782] statutes of the Nation are supreme law. The Supreme Court has established that "it should not be recognized to the Executive Power other faculties than the ones enumerated in article 86 of the Constitution among which it is not included the power to alter in any case nor in any matter the existing laws or statutes." (Fallos Supreme Court Decisions, volume 1, page 161; volume

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

112, page 367; volume 115, page 189.) The Supreme Court has also stated that "a ministerial resolution, although it may constitute an opinion referring to how the authority understands that law, should be construed, it has neither the authority nor the force of the decree, since the Executive Power can only issue it in the exercise of its constitutional powers, imposing formalities, requisites or conditions, which, without going against the meaning of the law, may ensure its more exact fulfilment." (Supreme Court Decisions volume 174, page 299; volume 176, page 353; volume 181, page 255; volume 184, page 660; volume 190, page 58; volume 191, page 514. etc.)

To the Twelfth Interrogatory, he says:

The letter of May 23, 1946, contains the acceptance of an offer according to article 1154 of the Civil Code. A contract is complete by the acceptance "as from the moment in which it has been sent to the proposer"; according to article 1155 this acceptance can be withdrawn "at any time before it reached the knowledge of the proposer." If withdrawal is attempted, after the acceptance reaches the proposer it causes damages as it is expressly said by said article. If the telegram was delivered after the acceptance of the offer was known by the offerer by means of the letter of May 23, 1946, it is clear that the withdrawal is ineffectual. To take advantage of article 1155 the offeree should be required to establish that his telegram was prior to

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

the receipt of his acceptance by the offerer.

To the Thirteenth Interrogatory, he says:

Interpretation of articles 1154 and 1155 has been made in the following terms: "Our commentators are in general inclined to the following doctrine: In principle the rule of article 1154 must be pre-eminent, the power to withdraw the acceptance while it has not reached the knowledge of the offerer according to article 1155 being considered as a limitation to the system by reason of equity. In our judgment the Court has followed this system: The contract is not considered definitely concluded until the moment in which the acceptance reaches the knowledge of the proposer and it is because of this that the offeree may withdraw his acceptance (article 1155, first part); but once this condition is fulfilled that is to say once the acceptance is known by the proposer, said condition functions retroactively and as a consequence from that moment coming in force of the contract will be considered as produced as from the moment in which [784] acceptance was sent (article 1154). (Salvat, Tratado de Derecho Civil Argentino, volume 5, page 40.) The author whose citation I quote has been judge of the Civil Court of Appeals and his opinions are generally followed in the decisions of the Court.

/s/ C. RAMOS,

CONSTANTINO RAMOS,

Interpreter.

/s/ ALBERTO PADILLA,

Witness.

/s/ JONES R. TROWBRIDGE,
Consul of the United States
of America. [785]

PLAINTIFF'S EXHIBIT 63

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMMERCIAL E IN-
DUSTRIAL S. A., a Corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Republic of Argentina,
City of Buenos Aires,
Embassy of the United States of America—ss.

I, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, do hereby certify that Mr. Hector A. R. Alfonso, Director of Exportation, the official in charge of issuing export licenses in the Republic of Argentina, did not appear to answer the interrogatories and the cross-interrogatories addressed to any Consul, Vice-Consul, or Consular Agent of the United States of America at Buenos Aires, Argentina, in the above-entitled cause. [786]

Dated at Buenos Aires, Argentina, this 5th day
of December, 1947.

/s/ JONES R. TROWBRIDGE,
Consul of the United States
of America. [787]

PLAINTIFF'S EXHIBIT 70

Toll Service and Telegrams
Place Called*

A-1660-ASA
(2-45)

MU 4371

For Abbreviations, See Reverse

| | Telephone Messages Under 25c | Other Messages |
|--------------------------|------------------------------------|-------------------|
| May | | |
| 10 NY | 6.50 | |
| 20 SF | 3.15 | |
| " | 1.80 | |
| 21 " | 4.90 | |
| 23 " | 3.85 | |
| 24 " | 2.25 | |
| 28 " | 4.90 | |
| 29 " | 4.20 | |
| 31 " | 3.15 | |
| Jun | | |
| 4 " | 1.80 | |
| 5 " | 4.55 | |
| May | | 41.05 |
| 10 Argentina Intl-B..... | 2.60 | |

Totals of Above Service Charges.....43.65

| | |
|------------------------------------|-------|
| U. S. Tax—Telephone messages under | |
| 25c—15% | 10.26 |
| Telephone messages over 24c and | |
| all domestic telegraph messages— | |
| 25% | .26 |
| International telegraph messages | |
| 10% | |

Total Carried to Bill.....54.17

*Explanation of Code Following “Place Called”:

A-Thts Company Telegram.

B-Other Company Telegram.

C-Collect Message. [789]

DEFENDANT'S EXHIBIT R-2

Engraw vs. Schenley

350 Fifth Avenue,

New York, N.Y.,

October 30, 1947,

at 10:15 o'clock A.M.

(Met pursuant to adjournment.)

Present:

Mr. Mesirov

Mr. Pickett

RALPH T. HEYMSFELD

resumed the stand and testified further as follows:

Mr. Mesirov: It is stipulated that this continuation of the examination of Ralph T. Heymsfeld

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

which is being held at the office of the defendant, at 350 Fifth Avenue, New York, in the absence of the Notary before whom Mr. Heymsfeld was sworn, shall have the same force and effect as though the examination had been continued in the presence of the Notary at his office at 10 East 40th Street, New York.

Mr. Pickett: So stipulated.

Direct Examination

(Continued)

By Mr. Mesirov:

Q. Mr. Heymsfeld, your counsel has produced a certain number of papers here, but has declined to allow their examination or copying, or state the substance of some thirteen memoranda or letters on the ground that they were privileged communications. Do I understand you [790] are making the claim of their being privileged communications and will not allow my examination or copying of these papers?

A. I will not make a blanket answer.

Q. Well, then, are they here?

Mr. Pickett: Yes, they are here.

Q. Do you want to make answer with reference to each one, or what?

A. The grounds may differ as to particular documents, yes.

Q. Will you please examine the documents as to which Mr. Pickett claimed privilege and tell us whether that claim is made on your behalf?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Discussion off the record.)

A. In answer to the question I will state the following: That by assigning particular reason for refusing to submit these documents, I do not intend to limit any legal argument that may be made by counsel to the corporation concerning the right that the defendant may have to refuse to submit these documents for inspection. In general, these communications consist of communications to me of facts upon which my legal opinion is requested, or contain extracts of legal opinions by me or by my assistant under my direction. These documents also include certain papers which I consider to be my private working [791] papers, acting in my capacity as an attorney in connection with the transactions.

It is my position that you are not entitled to inspect these documents.

Q. Or copy them? A. Or copy them.

Q. And that you refuse to state the contents of them? A. That is correct, sir.

Mr. Mesirov: Is it agreed that these papers may be marked for identification?

Mr. Pickett: I am perfectly willing to have them marked for identification. Of course it is understood that the reporter is not going to look at them, either.

Mr. Mesirov: All right. We will do that later.

Q. Mr. Heymsfeld, where did you go to obtain

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

all these papers? Were they in the files of the company?

A. Some of these papers were in my own law department files. Other papers were in other files of the company.

Q. By the law department, you mean the law department of the Schenley Company?

A. Yes.

Q. What was Mr. C. W. Metcalf's position with your company in May, June, July, and, say, in August of 1946?

A. He was a consultant. He advised principally on [792] matters concerning the purchase of certain types of materials.

Q. Had he any authority to act?

A. So far as I know, he had no authority to act, except such authority as was given him in particular situations.

Q. From time to time?

A. From time to time. That is correct.

Q. In May of 1946 was Schenley in need of glucose?

A. I can't answer that question.

Q. Because you do not know, or because you——

A. (Interposing): Because I do not know.

Q. When did you first learn of the purchase by Schenley of glucose involved in this case?

A. I never learned of any purchase.

Mr. Pickett: Mr. Mesirov—the witness anticipated my objection.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. When did you first learn of the transaction, with regard to glucose, between Schenley and Engraw or Whipple?

A. My best recollection is that I first learned of a transaction with Mr. Whipple on June 5, 1946.

Q. And from whom did you learn that fact?

A. Mr. Metcalf.

Q. Was Mr. Metcalf at that time in New York?

A. He was. [793]

Q. And what did he tell you about it?

A. I refuse to state, because he came to get my legal opinion on the situation.

Q. Was he a full-time employee of Schenley at that time, or a regular employee? I will put it that way—was he a regular employee?

A. I would not call him a regular or full-time employee, and he did not participate in any of the benefits, by way of compensation and otherwise, that were available to full-time or regular employees. He was a consultant. My recollection is that he also had some outside business interests of his own, which he carried on at the same time.

Q. Will you tell us what Mr. Metcalf's authority was as regards the glucose transactions involved in this case?

A. So far as I know, his authority was solely that of a consultant, and adviser in connection with the transactions. He had no authority either to purchase this or any other glucose, nor did he have authority to enter into any agreement concerning this transaction.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Q. I show you Plaintiff's Exhibit 18-N, which is a wire from Metcalf to Donnelly. Was that telegram sent in connection with his duties as adviser or consultant?

A. I would say that it is clear from the telegram itself [794] that he is asking for details and information; and, if my recollection is correct, there is another memorandum in which he sets forth what his purpose may have been, and that is the memorandum of June 3rd from Mr. Metcalf to Mr. Kiefer.

Mr. Pickett: Exhibit 25-N.

The Witness: Yes, Exhibit 25-N.

Q. Doesn't the telegram and memorandum indicate to you that Mr. Metcalf was doing other things than mere advising?

A. Well, it doesn't indicate that he was doing anything other than advising, so far as this transaction was concerned. I have already indicated that, in connection with other situations, he did particular things that he was asked to do from time to time.

Q. I am speaking of this particular transaction, in which he evidently is trying to arrange for the shipment of this glucose from Argentina to Schenley.

A. Well, this would indicate to me exactly what his function was. Mr. Gusky was the man who runs our traffic department, and he is the man who is in charge of arranging transportation. He is

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

asking Mr. Metcalf's assistance in getting certain information, so that he can make preparations, if any preparations need be made. I think it is clear from this memorandum that Mr. Metcalf was certainly not going to undertake to arrange the transportation.

Q. Have you any knowledge of the request to the New York office of Schenley for the issuance of a letter of credit in this transaction?

A. No, sir.

Q. You say you have no knowledge?

A. That is right.

Q. Do you know whether or not the New York office refused to issue such letter of credit to cover this glucose?

A. You mean refused somebody's request to issue the letters?

Q. Yes.

A. There was a request that came from Engraw, which we refused.

Q. You are now referring to a communication addressed to Schenley from Engraw, are you?

A. That is correct, sir.

Q. Are you referring to the cable, Plaintiff's Exhibit 26-N, addressed to Cincinnati?

A. Yes, that was the cable I had in mind. Also, the cable which is marked Exhibit 32-N.

Q. That was likewise addressed to Cincinnati, was it not?

A. That is correct. [796]

Q. Do you know of any telephone call from

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Cincinnati to your New York office asking that the New York office arrange for the issuance of a letter of credit? A. I do not.

Q. You hadn't been asked with reference to that, with reference to issuing a letter of credit at that time?

A. I received no request to issue a letter of credit.

Q. If such a request had been made, to whom would it be addressed in your organization in New York?

A. The actual details of issuing a letter of credit would be handled with the bank, if handled in normal course, by the treasury department. A request might have been received by the New York office through any one of a number of channels, depending upon who was making the request for the issuance of the letter of credit.

Q. To whom would it be submitted for approval?

A. It would finally have to be approved by an executive officer of the company.

Q. You? A. No, sir.

Q. You mean any one of a number of executive officers?

A. I would answer that question in this way, that the treasurer of the company would proceed to secure the [797] final issuance of the letter of credit, if he were entrusted to do so by any one of a number of officers of the company; but no officer

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

of the company would authorize the issuance of the letter unless he were personally familiar with all of the details of the transaction or familiarized himself with them by communication with other officers of the company.

Q. Who was the first one in your New York office, then, to whom the glucose transaction which is involved in this case was submitted?

A. I am unable to state. I believe that the first officer in the New York office to whose attention the matter came was Mr. Seskis, who is a vice-president of the company, but I am not certain of that.

Q. Did Mr. Seskis discuss this matter with you?

A. So far as I know, no request was ever made to Mr. Seskis to issue a letter of credit in this transaction.

Q. Who was the first one to call your attention to this glucose transaction?

A. Mr. Metcalf.

Q. And was that the conversation of June 5th, did you say?

A. Yes, June 5th, to my best recollection.

Q. And that is the conversation, the substance of which you decline to give? [798]

A. That is correct, sir.

Q. Did you, about that time, have a conversation with Mr. Woolsey on the subject?

A. That is correct—almost directly after the first conversation.

Q. And what was the substance of that conversation?

A. I decline to state.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Will you state for the record why?

The Witness: Because I consider it a privileged and confidential communication.

Q. Woolsey was assistant secretary, wasn't he, of the company at that time?

A. Yes, Woolsey was an assistant secretary of the company at that time.

Q. I show you a copy of a telegram addressed to Harold A. Whipple and signed Schenley Distillers Corporation by "Jas. E. Woolsey, assistant secretary," marked Plaintiff's Exhibit 31-N and ask you whether you know of the sending of this telegram by Mr. Woolsey.

A. Yes, I knew it was being sent.

Q. You knew it was being sent?

A. That is correct, sir?

Q. Did you direct him to send it?

A. May I state the circumstances?

Q. Certainly. [799]

A. Mr. Woolsey told me of a conversation that he had had with Mr. Whipple and stated that Mr. Whipple had requested that Mr. Woolsey confirm to him, by writing, what Mr. Woolsey told him in the conversation. I told Mr. Woolsey that I saw no objection to confirming it, in fact, I thought it was advisable to do so.

Q. Did you authorize the telephone conversation or the telephone notice on the part of Woolsey which this telegram confirmed?

A. I transmitted it, but did not authorize it.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. I don't quite understand your answer.

A. I don't mean to quibble, but I did not make the decision to give that notice to Mr. Whipple. That decision was made elsewhere in the company. I was told about it and instructed Mr. Woolsey to communicate with Mr. Whipple.

Q. Who made that decision?

A. To my best recollection, Mr. Kiefer.

Q. Of Cincinnati?

A. Mr. Kiefer spent most of his time in Cincinnati.

Q. And what is Mr. Kiefer's position with the company?

A. Mr. Kiefer is a vice-president in charge of the production department, of which the purchasing department is a division.

Q. And it was Mr. Kiefer's decision that this statement should be made to Mr. Whipple on behalf of the [800] Schenley Company?

A. It was Mr. Kiefer's decision that we would not go further with the purchase and, as I have stated, I then told Mr. Woolsey to communicate that decision to Mr. Whipple.

Q. Did Mr. Kiefer ask your advice as to whether or not that communication should be sent to Mr. Whipple, or did you merely follow his instructions to do so?

A. No. My best recollection is that Mr. Kiefer had made his decision and then discussed with me my opinion as to the procedure to be followed.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Q. The procedure you are referring to is as to the method of notifying Whipple or Engraw of his decision?

A. My recollection is when that decision was made we had already received a cable from Engraw, in which reference was made to contracts and to cancellation and to penalties, and Mr. Kiefer naturally sought my opinion in connection with the transaction, and the steps to be taken in it, and I gave him my advice as to the steps to be taken, because it was perfectly apparent that the parties were in a dispute.

Q. Plaintiff's Exhibit 33-N is a file memorandum made by Metcalf on June 11, 1946. Did Mr. Metcalf talk to you about that time, after his conversation with Whipple, as reported in this memorandum? [801]

A. Yes, he did talk to me about that time.

Q. Will you give me the substance of that conversation?

A. I refuse to give it, for the same reasons that I have given before.

Mr. Pickett: Let me state at this time, Mr. Mesirov, as I advised you before the examination today started, we found an office copy of a cablegram sent to Engraw dated June 11, 1946, which is now being photostated, and it should be here by this time. That may be the document you have in mind. I have asked Mr. Rosenfeld to see whether he cannot speed up the copies.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Discussion off the record.)

Q. I show you Plaintiff's Exhibit 34-N, dated June 13, headed "File memorandum," which I understand was made by Mr. Metcalf. Did Mr. Metcalf discuss with you the telephone message which he mentions in this memorandum?

A. My recollection is that Mr. Metcalf did tell me of a telephone conversation that he had with Mr. Stanton.

Q. What instructions, if any, did you give Mr. Metcalf with regard to the subject matter of the telephone call and his request for further information from Stanton?

A. I refuse to state, for the same reasons that I have previously given.

Q. Namely, that is a confidential communication and privileged? [802]

A. That is right. I was giving him my legal opinion as to the steps to be taken.

Mr. Pickett: At this point, Mr. Mesirov, if I may interrupt, we now have the photostats of the cable of June 11, 1946 to the plaintiff, which I hand you herewith.

Mr. Mesirov: Mark it for identification.

(Photostat of cable to Engraw, signed "Metcalf Distillers," June 11, 1946, marked Plaintiff's Exhibit 63-N for identification.)

Q. I show you Plaintiff's Exhibit 63-N for identification, which has just been produced by your

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

counsel, and ask you whether that cable was sent by Mr. Metcalf at your direction?

A. I prepared the cable and advised him to send it.

Q. And that was done at a conference had with Metcalf with regard to his talk with Whipple over the telephone, as reported in the memorandum dated June 11th? A. I don't recall that.

Q. Well, that is evident.

A. It would seem from the cable itself that it is a reply to a cable from Engraw.

(Discussion off the record.)

Q. Do you know Emanuel R. Dichter?

A. I know who he is. I have never met him.

Q. Wasn't he an employee of Schenley, attached to your New York office?

A. I don't know, at the moment, whether he was employed generally, or specially employed. I can find out easily enough. But, in either event, he performed some services for Schenley over a relatively short period of time, and in South America.

Q. You know, of course, that Metcalf sent Mr. Dichter to Buenos Aires?

A. I do know that, yes.

Q. Did you tell him to? A. No, I did not.

Q. Did you know of a time he telephoned to Dichter at Rio to go to Buenos Aires?

A. I knew that he was going to send Mr. Dichter from Brazil to the Argentine.

Q. Did you authorize him to do so?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. I did not authorize him to do so, no.

Q. Did he act on his own authority in doing it?

A. I can't answer that question.

Q. But he did talk to you before he telephoned Mr. Dichter at Brazil? A. That is correct.

Q. What do you know about the telephone conversations between Dichter and Metcalf while Dichter was in the [804] Argentine?

A. Only what Mr. Metcalf told me of them.

Q. What did he report to you as to the telephone conversations he had with Dichter?

A. I refuse to answer, on the ground previously stated.

Q. Do you happen to know why Dichter was sent to Brazil?

A. Yes. My recollection is that he was sent down in connection with the purchase or possible purchase of a material called manioc.

Q. Is that a substitute for glucose or a product used for the same purposes?

A. I do not believe it is, no, sir.

Q. I refer you to Plaintiff's Exhibit 36-N, consisting of a copy of a letter dated June 26, 1946, addressed to Mr. Ralph Stanton, and signed "Schenley Distillers Corporation, C. W. Metcalf." Was this letter sent under your instructions by Mr. Metcalf? A. It was sent by my advice.

Q. And I suppose you will state that Mr. Metcalf was still a consultant when he wrote this letter under your advice, was he?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. You mean was he acting in a consultant capacity in writing this letter?

Q. Yes. [805]

A. He was replying to a letter which had been addressed to him or to his attention.

Q. Was that a reply to a letter dated June 24, Plaintiff's Exhibit 35-N? A. Yes.

Mr. Pickett: Exhibit 35-N is the letter of June 24, 1936, and Exhibit 36-N referred to that letter of June 24th?

The Witness: That is right.

Q. I call your attention to Plaintiff's Exhibit 2-N, which is a copy of a cable addressed to "Metcalf Schenley Distillers, Inc." and signed "Engraw Dichter Berger" under date of July 7th. Was this cable submitted to you by Mr. Metcalf?

A. This cable came to my attention. I cannot say that I recall whether Metcalf showed it to me or not. I would assume that it was Metcalf.

Q. Did you have a talk with Metcalf with regard to this cable?

A. I had a talk with Metcalf with regard to the subject matter of the cable, yes.

Q. What instructions did you give Metcalf with regard to it?

A. I gave him no instructions with regard to it. I advised him concerning it. [806]

Q. What advice did you give him?

A. I refuse to state, for the same reasons that I have previously given.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Did Mr. Metcalf tell you about a telephone call that he received from Dichter, after this cable of July 8th was sent, confirming the views that he expressed therein?

A. I refuse to answer that question, on the grounds I have previously given.

Q. You mean you refuse to state whether or not Mr. Metcalf told you that he had a telephone call from Dichter subsequent to July 8th?

A. Mr. Mesirov, if I understood your question, you asked me indirectly as to the substance of what he told me.

(Discussion off the record.)

Q. I mean, in which Dichter confirmed what he recommended in this cable.

A. That I refuse to answer.

Q. Did he tell you that he had a telephone call from Mr. Dichter following his showing you the cable dated July 8th?

Mr. Pickett: May we have the last question?

(Question read.)

Mr. Pickett: I think the witness testified that he [807] didn't know whether Metcalf had showed him the cable or just discussed the substance with him.

A. I don't recall whether or not he showed me the cable. He did tell me that he had had a telephone conversation with Mr. Berger. I don't recall

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

whether or not he told me of a conversation with Dichter, as to which Dichter testified.

Q. I show you Plaintiff's Exhibit 38-N, headed "Inter-office memorandum," July 11, 1946, evidently made by C. W. Metcalf, as to a telephone conversation had by him with Mr. Berger, and ask you whether Mr. Metcalf submitted this memorandum to you or conveyed the information as to this telephone conversation. A. Yes.

Q. What was the result of the talk you had with Mr. Metcalf with regard to this telephone conversation?

A. One result was that I retained the services of Momsen and Freeman.

Q. I show you Plaintiff's Exhibit 39-N, headed "Inter-office communication," July 12, 1946, in which Metcalf states that he told Mr. Berger that "We have retained Momsen & Freeman of New York to represent us in settling this matter," and Berger and Dichter were to get in touch with Dr. Goytia in reference to the matter.

Did you instruct Metcalf to notify Berger and Dichter [808] to take up the matter with Mr. Goytia? A. I did not.

Q. Who did?

A. I don't know that anybody did.

Q. Do you mean that Metcalf, acting on his own authority, had referred the matter to Dr. Goytia?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

A. No. I referred the matter to Dr. Goytia for opinion on a particular question.

Q. And that was what?

A. The question concerning the effect of registration of a contract with the Chamber of Commerce in the Argentine.

Q. The memorandum made by Metcalf under date of July 12th states: "I talked to Messrs. Berger and Dichter regarding the Engraw glucose matter. I told Mr. Berger that we had retained Momsen and Freeman of New York to represent us in settling this matter."

And then follows the statement that Dr. Victor Goytia was Momsen and Freeman's representative in Argentina, and that Dichter and Berger were to keep in touch with Dr. Goytia in relation to this matter.

Did Metcalf show you this inter-office communication, or was that inter-office communication sent to you? A. Not that I recall.

Q. Did he tell you the substance of this talk with Berger and Dichter, as stated in this memorandum? [809]

A. He told me the substance of his talk with Berger and Dichter, but I would not say that this memorandum correctly reflects what he told me.

Q. Do you mean to say that Mr. Metcalf would inform Dichter, who was your employee, and Berger, representing the plaintiff in this case, that

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Dr. Goytia was to negotiate a settlement, if no such purpose was authorized?

Mr. Pickett: I am going to object to the form of the question. It assumes a state of facts which has not been shown to be a correct one, to wit, that Dr. Goytia was to negotiate to settle the matter and had been retained for that purpose.

Mr. Mesirov: Now, will you answer the question?

(Question read.)

A. Mr. Mesirov, it seems to me we are just arguing with each other as to what Metcalf would or would not tell. I cannot tell what Metcalf would say. I am simply saying that if Metcalf did make this statement, it was not in accordance with the facts.

Q. Are you saying now that Momsen and Freeman were not engaged to represent you in settling this matter?

A. Most emphatically, they were not.

Q. Did you receive any reports from Dr. Goytia, either direct or through Momsen and Freeman, as to their negotiations with Engraw? [810]

A. I received reports from Momsen and Freeman as to what had occurred—I would not call them negotiations—between Dr. Goytia and Engraw. It was my understanding that Dr. Goytia represented Engraw.

Q. Represented Engraw?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

A. That is correct. And for the limited purpose for which we were engaging Momsen and Freeman, I had no objection to his representing Engraw.

Q. Did Mr. Metcalf tell you that he was informed by Mr. Berger, when Metcalf suggested they go to see Dr. Goytia, that the latter had represented Engraw in some matters and that Metcalf's reply was that he saw no objection to Goytia acting for you, in spite of that fact?

A. Metcalf never made that statement to me. I did know that Dr. Goytia represented Engraw.

Q. How did you know that?

A. I learned it. I cannot say whether I learned that first from Momsen and Freeman or from Mr. Metcalf.

Q. Were you advised, Mr. Heymsfeld, of the contents, or did you receive copies, of cables addressed to Momsen and Freeman from Goytia, two of them dated July 18th and one dated July 22nd, being Plaintiff's Exhibits 3-N and 4-N and 5-N?

The Witness: Would you repeat the question?

Q. Yes. [811]

(Question read.)

A. Yes.

Q. What instructions did you give counsel as to these communications?

A. I refuse to answer that.

Q. On what ground?

A. On the ground that any conversation between

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)
myself and these counsel would be confidential and privileged.

Q. I show you Plaintiff's Exhibit 42-N, being a copy of a cable addressed to "L. C. Metcalf, Schenley Distillers, N Yk.," dated July 12th, reading as follows: "20% letter credit margin acceptable for liquidation program," signed "Engraw."

Did Mr. Metcalf show you this cable?

A. My recollection is that he did.

Q. That he did? A. That he did.

Q. Have you any memorandum of a communication from Metcalf to which this cable must have been a reply?

Mr. Pickett: I object to the form of the question. I don't know that there must have been any such communication to which this cable was a reply. My objection is purely as to the form of the question, Mr. Mesirov.

Q. To what was this cable a reply?

A. I cannot state. I do not know. [812]

Q. Did you have any conversation with Metcalf with regard to the amount of letter credit which would be acceptable to Engraw in a program of liquidation?

A. I know I had no such conversation at about that time. Whether there was any conversation at about that time. Whether there was any conversation later, I don't recall. Perhaps I can refresh my memory from the files.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Q. Did you instruct Metcalf to inquire whether a 20% margin would be acceptable to Engraw in a program of liquidation? A. No.

Q. Is there any alleged confidential communication which relates to this subject as to which this cable was a reply?

Mr. Pickett: Are you willing to accept my answer to that?

Mr. Mesirov: Yes.

Mr. Pickett: The answer is, if there is, I have never seen it.

(Discussion off the record.)

Q. Do you know to what this cable was a reply?

A. No, sir, I do not.

Q. I show you Plaintiff's Exhibit 6-N, being a copy of a memorandum marked "Inter-office communication" from Mr. G. Fred Berger to Mr. E. R. Dichter, dated August 2, 1946. [813] and ask you whether or not you saw the original of this memorandum.

A. I have seen a ribbon copy of this memorandum, without certain of the notations on it which this memorandum has.

Mr. Pickett: The original of this memorandum, a copy of which is marked Exhibit 6-N, was produced by me at the previous hearing. At that time you did not want it marked. If you want to mark the original memorandum——

Mr. Mesirov: All right; mark the original.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: I have here the original document, and I am now producing it for the purpose of being marked.

Q. Is this the memorandum just now produced by Mr. Pickett, which you saw? A. Yes.

Mr. Mesirov: Mark it.

(Original of memorandum marked "Inter-office communication" from Mr. G. Fred Berger to Mr. E. R. Dichter, August 2, 1946, marked Plaintiff's Exhibit 64-N for Identification.)

Q. From whom did you receive this memorandum?

A. I received this from my assistant, Mr. Rosenfeld, who told me he had received it from Mr. Dichter.

Q. Did you discuss the subject matter of this memorandum with any one in your company?

A. No, sir, I did not, that I recall.

Q. What action, if any, did you take after receiving this memorandum? [814]

A. I received this from my assistant, Mr. Rosenfeld, who told me he had received it from Mr. Dichter.

Q. Did you discuss the subject matter of this memorandum with any one in your company?

A. No, sir, I did not, that I recall.

Q. What action, if any, did you take after receiving this memorandum?

A. I took no action.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. I show you a copy of a cable dated August 8th, addressed to Emanuel Dichter at 150 Bennett Avenue, New York, signed "Berger," and ask you whether Mr. Dichter, or anyone else, informed you of having received this cable?

A. Not that I recall.

Mr. Mesirov: Mark it for identification.

(Copy of cable dated August 8th, Berger to Dichter, marked Plaintiff's Exhibit 85-N for Identification.)

Q. I show you copy of a cable marked in pencil August 8th, addressed to Berger, stating, "Legal department will inform promptly," and signed "Dichter." Did Dichter communicate with you before sending this cable?

Mr. Pickett: I object to the form of the question, because it assumes a state of facts not yet shown, to wit, that Mr. Dichter ever sent this cable.

A. No, he did not.

Q. Did he ever send you a copy of this cable?

A. No, sir.

Q. Did you know that he sent this cable?

A. I did not.

Q. Do you know whether any officer of your company received a copy of this cable?

Mr. Pickett: You understand, Mr. Mesirov, my saying that objection is made as to form.

A. Not to my knowledge.

Mr. Mesirov: Mark it.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

(Copy of cable, addressed to Berger, signed Dichter, August 8th, marked Plaintiff's Exhibit 66-N for Identification.)

Q. Mr. Heymsfeld, did you instruct Mr. Woolsey to inform Donnelly that the Schenley legal department would handle the matter, this glucose matter, and that Donnelly was to take no further part in it? A. I don't recall that I did.

Q. Would you say that you did not instruct him to that effect?

A. I will say categorically that I did not instruct him to call Mr. Donnelly and tell him that.

Q. Did you tell Mr. Woolsey that the entire matter would be handled, from that point on, by the legal department?

A. I told him that the matter of the dispute had been referred to the legal department. [816]

Q. And did you tell him that the matter would be handled by the legal department?

A. I don't know exactly what words I used, but it was perfectly evident that any action that the company took would be as advised by the company's lawyers, in the same way that I would assume that any action that the other side took, they took on the advice of their counsel.

Q. When you say "by the company's lawyers," you mean by the legal department of the company, don't you?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

A. Not necessarily. As the matter stood at that time, on my advice, as an attorney.

Q. As a matter of fact, all subsequent conferences, communications or negotiations were conducted by you or your legal department, were they not?

A. I conducted no negotiations of any kind, until August 27, 1946, when I had my conference with Mr. Hosey. On the question of whether that was a negotiation or not, I am not going to try to characterize that conversation; but I think the record is perfectly clear that from the date that we received a cable from Engraw stating that there were penalties and indicating that this matter would become a legal matter, that the matter was referred to me for advice, and that I did advise in every instance in which I was kept informed of the developments. On the other hand, as I believe I stated on the first day, I made no decisions as to whether [817] we were to buy the glucose or not to buy it, or proceed with the purchase or attempt to liquidate it as part of a settlement of this controversy, or any of those steps. Those were matters of business decision which I did not make.

Q. Who made them?

A. Well, if you take them one at a time, I think the record pretty well shows who made which decisions; and as to some, I would have to say that I don't know who made them.

Q. Then do I understand that the only persons

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

who decided anything for Schenley with regard to the glucose matter were the persons whose names have been mentioned in the depositions so far taken or in the memoranda and letters so far produced?

A. I can't answer that question.

Q. By "I can't answer that question," what do you mean?

A. I mean, I don't understand the question.

Mr. Mesirov: Read it to the witness.

(Question read.)

Q. The reason I put it that way is that you have made a statement that these papers show who acted as to what.

A. I said the testimony showed, Mr. Mesirov.

Mr. Pickett: He said as to other things, he didn't know; who made the decision.

(Discussion off the record.)

Q. Who finally decided to refuse to go on with the [818] purchase?

A. My best recollection is that it was Mr. Kiefer.

Q. And he had full authority to so decide?

A. He did.

Q. Wasn't it under your instructions that he decided not to go on? A. Certainly not.

Q. You mean to say that Mr. Kiefer was authorized to involve your company in a possible suit involving a half a million or \$400,000 purchase?

A. Certainly not. That is a rhetorical question, if I ever heard one.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Was his decision made upon your approval?

A. Certainly not. He didn't ask my approval or disapproval on that decision.

Q. If any one other than the persons mentioned in the testimony and referred to in these memoranda had been consulted, and decided on this matter, you would know of it, wouldn't you?

A. In the normal course I would expect to learn of it, yes.

Q. Have you examined all of your files with regard to this glucose matter? A. Yes.

Q. Would or would not your files show if someone [819] other than the persons whose names have already appeared made any decision with regard to this matter?

A. They might or might not.

Q. Do they show the name of any other person than those that have been mentioned?

A. No.

Q. I believe it has been testified that this glucose was intended to be used by Many Blanc & Co.?

Mr. Pickett: I don't think that is the testimony, Mr. Mesirov.

Mr. Mesirov: I think it is in the West Coast testimony.

A. I can perhaps shorten this by saying that I do not know for what purpose this glucose was to be used.

Q. Are you a director of Many Blanc?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. No. I never have been.

Q. I notice that at least some of the Metcalf memorandums are marked "Inter-office communications." To whom would they be sent?

A. I can't answer that. I don't know. He seemed to have made a practice of marking some of his file memoranda "Inter-office communication." In some instances we found ribbon copies of papers marked "Inter-office communication," (in ink) RTH in Mr. Metcalf's file.

Q. Did you have a representative in the Argentine in 1946? [820]

A. You mean in the whiskey business?

Q. Representative of the Schenley companies.

A. There was a period of time, I can't say at the moment whether it was in 1946 or not, when we had a sales representative in the Argentine, whose function it was to sell, take orders for whiskey, and promote their sale.

Q. Only for importing whiskey into the Argentine, is that it?

A. I believe that is correct, sir.

Q. Did you ever buy anything in the Argentine?

A. Not that I know of, but I cannot say definitely whether the company did or not.

Q. Mr. Gusky's name appears in some of the communications with reference to this matter. What was his position with your company?

A. Mr. Guskey was the company's traffic mana-

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

ger and it was his duty to arrange transportation.

Q. And where was he located?

A. His principal office was in New York, but I believe that he maintained a branch office in Cincinnati as well, which was headed by one of his assistants.

Q. Who informed him that Schenley had purchased this glucose in the Argentine?

A. You understand that there was no purchase.

Mr. Mesirov: Don't let us quibble with words.

The Witness: If you want to change that to "transaction"—

(Discussion off the record.)

A. I do not know how he learned of the glucose transaction.

Q. You don't know?

A. I don't know.

(Whereupon, at 1:00 o'clock p.m., an adjournment was taken to 2:45 o'clock p.m.)

Afternoon Session

2:45 o'Clock P.M.

Mr. Pickett: Mr. Mesirov, in accord with our understanding, I am going to use for marking by the reporter, on the reverse side, the various documents as to which privilege has been claimed and which we have not permitted for your inspection for copying.

Mr. Mesirov: You of course understand that as

Defendant's Exhibit R-2—(Continued)

to the documents which you are now offering to have marked only, such production and marking is not taken by me in satisfaction of the order made by the Court to produce them in California.

Mr. Pickett: My understanding—I may be wrong on [822] this—is that the order does not relate to any of these documents.

Mr. Mesirov: I merely want to call attention to it, so that they don't have to argue back and forth. That is so understood?

Mr. Pickett: That is correct.

Mr. Mesirov: All right. Proceed.

Mr. Pickett: First, I have here the record of a telephone conversation between Mr. Woolsey and Mr. Heymsfeld on June 11, 1946, which is referred to on page 122 of the minutes.

(Record of telephone conversation, Mr. Woolsey and Mr. Heymsfeld, June 11, 1946, marked Plaintiff's Exhibit 67-N for identification.)

Mr. Pickett: The next document, sir, is one of those referred to on pages 140 and 141 of the minutes. This is a memorandum dated May 15, 1946, from Mr. R. H. Baglin to Mr. Woolsey.

(Memorandum, R. H. Baglin to Woolsey, marked Plaintiff's Exhibit 68-N for identification.)

Mr. Pickett: The second of those three documents is a memorandum dated May 17, 1946, to R. H. Baglin from Mr. Woolsey.

Defendant's Exhibit R-2—(Continued)

(Memorandum, May 17, 1946, Mr. Woolsey to Mr. R. H. Baglin, marked Plaintiff's Exhibit 69-N for identification.)

Mr. Pickett: The third of those documents is a memorandum dated May 20, 1946, from Mr. Woolsey to Mr. R. H. Baglin.

(Memorandum, May 20, 1946, Mr. Woolsey to Mr. B. H. Baglin marked Plaintiff's Exhibit 70-N for Identification.)

Mr. Pickett: The next is a document referred to on page 142 of the minutes. This is a memorandum or letter from Mr. Seasonwein to Mr. Woolsey dated May 28, 1946, and attached to that is a copy of a letter from the law firm of Cooke and signed "Beneman," dated May 21, 1946, which is addressed to Mr. R. H. Baglin.

(Memorandum, May 28, 1946, Mr. Seasonwein to Mr. Woolsey, with attachment above referred to, marked Plaintiff's Exhibit 71-N for Identification.)

Mr. Pickett: Next, is the memorandum from Mr. Woolsey to Mr. Seasonwein dated June 3, 1946, which is referred to at the bottom of page 142 of the minutes.

(Memorandum, June 3, 1946, Mr. Woolsey to Mr. Seasonwein, marked Plaintiff's Exhibit 72-N for Identification.)

Mr. Pickett: Next, is a communication from Mr. Woolsey to Mr. R. H. Baglin dated June 4,

Defendant's Exhibit R-2—(Continued)

1946, which is referred to at the bottom of page 142 and the top of page 143 of the minutes.

(Communication, June 4, 1946, Mr. Woolsey to Mr. R. H. Baglin, marked Plaintiff's Exhibit 73-N for Identification.)

Mr. Pickett: Next, is the memorandum from Mr. G. E. [824] Baglin to Mr. Woolsey, dated June 5, 1946, as referred to on page 143 of the minutes. This is three pages long.

(Memorandum, three pages, June 5, 1946, Mr. G. E. Baglin to Mr. Woolsey, marked Plaintiff's Exhibit 74-N for identification.)

Mr. Pickett: Next, is the memorandum headed "Memorandum for the file" bearing Mr. Heymsfeld's name at the bottom, dated June 6, 1946, which is referred to on pages 146 and 147 of the minutes. This document is nine pages long.

(File memorandum bearing Mr. Heymsfeld's name, June 8, 1946, nine pages, marked Plaintiff's Exhibit 75-N for Identification.)

Mr. Pickett: Next is the memorandum dated June 10th, with Mr. Heymsfeld's name at the bottom, referred to on page 147 of the minutes.

(Memorandum, June 10th, Mr. Heymsfeld's name at the bottom, marked Plaintiff's Exhibit 76-N for Identification.)

Mr. Pickett: Next is the memorandum of June 24, 1946, from Mr. Metcalf to Mr. Heymsfeld, which is referred to on page 147 of the minutes.

Defendant's Exhibit R-2—(Continued)

(Memorandum, June 24, 1946, Mr. Metcalf to Mr. Heymsfeld, marked Plaintiff's Exhibit 77-N for Identification.)

Mr. Pickett: Next is a memorandum from Mr. Heymsfeld to Mr. Metcalf dated June 26, 1946, referred to at the bottom of page 147 of the minutes.

(Memorandum, June 26, 1946, Mr. Heymsfeld to Mr. Metcalf, marked Plaintiff's Exhibit 78-N for Identification.)

Mr. Pickett: Now I have the memorandum from Mr. Heymsfeld to Mr. Caaden dated July 12, 1946, referred to on page 146 of the minutes.

(Memorandum, July 12, 1946, Mr. Heymsfeld to Mr. Caaden, marked Plaintiff's Exhibit 79-N for Identification.)

Mr. Pickett: That is all.

RALPH T. HEYMSFELD

resumed the stand and further testified as follows:

Cross-Examination

By Mr. Pickett:

Q. Mr. Heymsfeld, you were asked about a telephone conversation which you had with Mr. Woolsey on June 6, 1946, specifically as to instructions which you gave to Mr. Woolsey to be communicated to Mr. Donnelly. Confining yourself to that subject, will you state what you told Mr. Woolsey about it?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. As I have testified, I did not tell Mr. Woolsey to instruct Mr. Donnelly not to do anything further in the matter. I did tell Mr. Woolsey that the matter had been referred to the legal department and for him to make sure that no one in the company's employ on the Coast took any steps in the matter without clearing with him, and in turn, with me. [826]

Mr. Pickett: That is all.

(Discussion off the record.)

Mr. Mesirov: That is all.

(Deposition closed.) [827]

[Title of District Court and Cause.]

The foregoing testimony of said Ralph T. Heymsfeld being from pages 104 to 195, both inclusive, the changes and corrections made in the testimony by said witness, Ralph T. Heymsfeld, were each duly initialed by him and were to correct errors; said corrections appearing on pages 116; 154 and 188.

/s/ RALPH T. HEYMSFELD.

Sworn and subscribed to before me by said Ralph T. Heymsfeld this 21st day of November, A.D. 1947.

[Seal]

JAMES B. KILSHEIMER,

Notary Public in the State of
New York. [828]

DEFENDANT'S EXHIBIT R-3

(Left-hand Side of Photostat)

50 Gal

Equals $5\frac{1}{8}$ # (gal.

Argentine Glucose

1300 Tons till Dec 31

100 T 1 mo after. balance in Dec

50 T June

9.6—10.2 # (gal.

43—45 Baume

Crystal clear

42.8 —80.8 balling up

| | | |
|---------------------------|-------------|---------|
| (4 to 6c) | 2c 1 # duty | fob. |
| 22.3c 1 # in wood barrels | | W Coast |
| 300 Kl. equals 660 # | | port. |

Prior 50 T 1 mo for 6 mo. L of credit

1000 July.—

Jan 1 3 ts 500 ts monthly

(Right-hand side of photostat)

Harold:

Whipple importer—

Drums

Mut 437

45-60 days.

50 T / — to 100 T

higher than ceiling

no violation.

$\frac{3}{4}$ # 1 case. sugar.

PL. EX. 7-N ID. 10/22/47

Defendant's Exhibit R-3—(Continued)
(Right-hand side of Photostat)

Wednesday

| April | | | | | | | June | | | | | | |
|-------|----|----|----|----|----|----|------|----|----|----|----|----|----|
| S | M | T | W | T | F | S | S | M | T | W | T | F | S |
| | 1 | 2 | 3 | 4 | 5 | 6 | | | | | | | 1 |
| 7 | 8 | 9 | 10 | 11 | 12 | 13 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 14 | 15 | 16 | 17 | 18 | 19 | 20 | 9 | 10 | 11 | 12 | 13 | 14 | 15 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 | 16 | 17 | 18 | 19 | 20 | 21 | 22 |
| 28 | 29 | 30 | 31 | | | | 23 | 24 | 25 | 26 | 27 | 28 | 29 |
| | | | | | | | 30 | | | | | | |

Mr. Whipple)

Ambas. 36.50)

Mr. Rowe—(Shorthand notation)

Do 0516

ada

PL. EX. 8-N ID 10/22/47

(Left-hand Side of Photostat)

Monday

| May | | | | | | | 3 | July | | | | | | |
|-----|----|----|----|----|----|----|---|------|----|----|----|----|----|----|
| S | M | T | W | T | F | S | | S | M | T | W | T | F | S |
| | | | 1 | 2 | 3 | 4 | | | 1 | 2 | 3 | 4 | 5 | 6 |
| 5 | 6 | 7 | 8 | 8 | 10 | 11 | | 7 | 8 | 9 | 10 | 11 | 12 | 13 |
| 12 | 13 | 14 | 15 | 16 | 17 | 18 | | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 | | 21 | 22 | 23 | 24 | 25 | 26 | 27 |
| 26 | 27 | 28 | 29 | 30 | 31 | | | 28 | 29 | 30 | 31 | | | |

Mr. Petrov (Notation in shorthand).

Fresno op. 225 Thomas

Mr. Parr

Mr. Pobat

L A op. 17 Whipple

(Shorthand notation) op. 225 Harrison

Macabee pa. 6194

Defendant's Exhibit R-3—(Continued)
(Upper Center of Photostat)

If Payment is Made at Our Office, Please Present
Bill and Bill Stub.

June 6, 1946

(Bell Telephone Insignia)

To The Pacific Telephone and Telegraph Co., Dr.
Addresses of Business Offices Are Shown on
the Back of This Bill

Entered in Recurring Charge Schedule 7/30/46.

If this bill is not paid within fifteen days from date
of presentation, service may be discontinued, in
which event restoration will not be made until this
bill has been paid.

Terms N/c

Amt. Disc.

Extension DA 7/31

N.O Initial

Bill Check HO 7/20/46

B/C Audit GGH 7/31

Schenley Distilleries, Inc.,
900 Battery St.

| Message | Unit Rates | Date |
|------------------------------------|------------|------|
| Class of Service | | |
| Included with Zone Service Charge. | | |

Each Additional
Message Unit

Each Residence

| | |
|--------------------------------|------|
| Message Service 60 Mess. Units | 31½c |
|--------------------------------|------|

Each Business

| | |
|--------------------------------|------|
| Individual Line 85 Mess. Units | 31½c |
|--------------------------------|------|

| | |
|--------------|------|
| Com'l P.B.K. | 31½c |
|--------------|------|

Defendant's Exhibit R-3—(Continued)

Zone Service Charges (Incl. U.S. Tax of .89 6.84
For One Month Preceding

Date of This Bill

Message Unit Charges 178

To Date of This Bill

(Total Message Units Used (Incl. U.S. Tax of
.49) 3.75

Toll, Telegram and Messenger Charges 187.83

Paid By Check No.

Date

(Statement Enclosed)

Other Charges and Credits (Explanation En-
closed)

Directory Advertising Charges for One Month
Beginning with Date of This Bill

(Please Deduct From Total Any Amount of
This)

(Balance Paid Before Receiving This Bill)

Balance from Previous Bill 160.87

Total 359.29

Cs. 160.87

1 OK—L Proxel (S) 198.42

Defendant's Exhibit R-3—(Continued)

(Upper Left-hand Side of Photostat)

Toll Service and Telegrams A-1890-CA

EX 7242 Place Called* (4-45)

For Abbreviations See Reverse

| Telephone Messages Under 25c | Other Messages |
|------------------------------------|-------------------|
|------------------------------------|-------------------|

May

| | | |
|----|-------------------|-------|
| 6 | HARRIA LA | 1.80 |
| 7 | 77506 BKFD | 1.15 |
| | DONNELLY MRCD (C) | .75 |
| | 90 CRML | .80 |
| 9 | 4300 SSF | 10 |
| | 40673 BURL | 15 |
| 10 | 40483 BURL | 15 |
| | 90 CRML | .65 |
| 13 | BOYD BKFD | 2.75 |
| | ” | 1.55 |
| | HUGHS HUGH | .75 |
| 14 | xWhipple LA | 4.55 |
| | TURNER LVMR | .60 |
| | FKT 9945 LA | 2.05 |
| | BALLZER CINN | 11.15 |
| 16 | 40673 BURL | 20 |
| | MACABER RIVBK | .75 |
| | FISHEL KGSBG | 1.25 |
| 17 | 4300 SSF | 10 |
| | AMENTA BKFD | 2.35 |
| | ROSENST EL LA | 4.20 |
| | EPSTEIN PJLA | 7.10 |

Defendant's Exhibit R-3—(Continued)
 (Left-hand Side of Photostat) (Continued)

Totals of Above Service Charges

U. S. Tax—Telephone Message under 25c—15%

Telephone messages over 24c each and all domestic telegraph messages, 25%.

International Telegraph Messages—10%

Total Carried to Bill

*Explanation of Code Following "Place Called"

A—This Company Telegram.

B—Other Company Telegram.

C—Collect Message

(Right-hand Side of Photostat)

Toll Service and Telegrams—A-1890-CA

EX 7242 FWD Place Called* (4-45)

For Abbreviations See Reverse

| Telephone Messages Under 25c | Other Messages |
|------------------------------------|-------------------|
|------------------------------------|-------------------|

MAY

20 4300 SSF 20

" 10

22 40673 BURL 15

HARRISON TRLK 1.35

FRIFFEN CINN 15.95

23 TEDLOCK DOWN 5.60

EX 9593 L 1.35

DR 7011La 1.35

99 ELK GR .70

REDLOCK DOWN 3.15

Defendant's Exhibit R-3—(Continued)

(Right-hand Side of Photostat) (Continued)

| | |
|-------------------|------|
| 24 HARRIGAN SELMA | 1.25 |
| xWHIPPLE LA | 4.55 |
| 217 PET | .30 |
| CHILLA FRS | 1.15 |
| 1207 KERMAN | 1.05 |
| RAYMOND LA | 1.80 |
| BERSTIN PNX | 3.75 |
| MALOY MT VERN | 3.75 |
| 27 31241 PNC | 1.45 |
| SMITY WASH DC | 3.50 |
| CINN (B) | 1.46 |

Totals of Above Service Charges

| | |
|--|-------|
| U. S. Tax—Telephone messages under 25c—15% | |
| Telephone messages over 24c each and) | |
| |) 25% |
| all domestic telegraph messages |) |
| International telegraph messages 10% | |
| PL. EX 9-N ID 10/22/47 | |

(Left-hand side of Photostat)

Toll Service and Telegrams

| | |
|---------------|-----------|
| EX 7242 FWD | A-1890-CA |
| Place Called* | (4-45) |

For Abbreviations See Reserve.

| | Telephone | Other |
|---------------------|-----------|----------|
| | Messages | Messages |
| | Under 25c | |
| May | | |
| 27 MORRISON WASH DC | | 14.30 |
| AMENTA BKFD | | 5.15 |
| “ | | 7.25 |

Defendant's Exhibit R-3—(Continued)

(Left-hand side of Photostat)—(Continued)

| | | |
|-----|------------------|------|
| 28 | MOLICKSON KERMAN | 1.05 |
| 29 | BERFRELL OKDL | .75 |
| | MCABSE RVBK | .95 |
| | FOLULER NLK | .95 |
| | HILL MDO | .65 |
| | CHOOIJIN FRS | 1.15 |
| | 5F31 SGR | 1.25 |
| | 1207 KERMA | 1.05 |
| 31 | 607 CRML | .65 |
| | 350 “ | .65 |
| | 500 “ | .65 |
| | 900 “ | .80 |
| | 691 “ | .65 |
| Jun | | |
| | 3 6194 PA | 1.36 |
| | LYDEKCER MDO | .80 |
| | POOCHINELLI TRLK | .75 |
| | ARMENTO BKFD | 1.95 |

Totals of Above Service Charges

U.S. Tax—Telephone messages under 25c, 15%.

Telephone messages over 24c each and all domestic telegraph messages, 25%.

International telegraph messages, 10%.

Total Carried to Bill

*Explanation of Code following “Place Called”:

A—This Company Telegram.

B—Other Company Telegram.

C—Collect Message. [839]

Defendant's Exhibit R-3—(Continued)

(Right-hand side of Photostat)

Toll Service and Telegrams

A-1890-CA

(4-45)

EX 7242 FWD

Place Called*

For Abbreviations See Reverse.

| Telephone | Other |
|-----------|----------|
| Messages | Messages |
| Under 25c | |

Jun

| | |
|-------------|------|
| 3 43511 FRS | 1.45 |
|-------------|------|

| | |
|---|-----|
| “ | .90 |
|---|-----|

| | |
|----------------|------|
| TEDLOCK ARTESA | 5.95 |
|----------------|------|

| | |
|------------|-----|
| 187 ST HLN | .40 |
|------------|-----|

| | | |
|---------------------------------|------|--------|
| Totals of Above Service Charges | 1.15 | 149.21 |
|---------------------------------|------|--------|

U.S. Tax—Telephone messages under 25c, 15%.

Telephone messages over 24c each

and all domestic telegraph messages,

| | | |
|-----|-----|-------|
| 25% | .17 | 37.30 |
|-----|-----|-------|

International telegraph messages, 10%.

| | |
|-----------------------|--------|
| Total Carried to Bill | 187.83 |
|-----------------------|--------|

*Explanation of Code Following “Place Called”:

A—This Company Telegram.

B—Other Company Telegram.

C—Collect Message.

Defendant's Exhibit R-3—(Continued)

Copy of Vendor's Bill

July 11, 1946

Date

Vendor Pacific Tel. & Tel. Co.

444 Bush Street

San Francisco, Calif.

Shipper.....

Invoice No. YU 0473

Purchase Order #.....

Terms

F.O.B.

Freight Bill No.

Waybill No.

Car No.

Consignee Schenley Distillers Corp.

850 Battery Street

San Francisco 11, Calif.

| Description | Quantity | | Amount | |
|-------------|----------|------|---------|---------|
| | Weight | Rate | Prepaid | Collect |

Entered in Recurring Charge Schedule.

Date 7/23/46.

Initial H.O.

Tel mess. under .25.

| | | |
|-------------|----|----------|
| ZONE SER | \$ | 6.35 |
| MESS. UNITS | | .72 |
| TOLL, ETC. | | 104.38 |
| BALANCE | | 100.58 |
| TOTAL | | 301.33 |
| Other Mess. | | \$111.43 |
| June [841] | | |

Defendant's Exhibit R-3—(Continued)

May

| | | |
|------------------|-----|------|
| 20 MU 4371 LA | | 1.35 |
| 11 7750 BKFD | | 7.45 |
| 12 TERRELL PNX | | 2.00 |
| 32181 PNX | | 1.45 |
| 14 LINDSEY BKFD | | 1.55 |
| 17 SAMMON LA | | 4.55 |
| 19 909J SCAR | .20 | |
| WINETROB LA | | 1.80 |
| 20 GARDNAR SELMA | | 2.15 |
| REECE MTCA | | .60 |
| BRETHRICK LA | | 2.70 |
| 21 7411 OKDL | | .75 |
| JOCK SELMA | | 1.25 |
| 24 BURNS BKFD | | 1.55 |
| BAGLEY SCAR | | .25 |
| 28 TERRELL PNX | | 3.75 |
| BERRYBILL MDO | | .65 |

July

| | | |
|---------------|-----|-------|
| 1 REIS MTCA | | .75 |
| REICH MTCA | | 1.05 |
| BEIRGHILL MDO | | .65 |
| LAUFER CINC | | 11.75 |
| 2 909J SCAR | .20 | |
| GRUNSKY TRLK | | .95 |
| KENREID PNX | | 6.55 |

Terms n/c

Amt. Disc.

Extension DA 7-23

Bill Check H.O. 7/23/46

Defendant's Exhibit R-3—(Continued)

B/C Audit GGH 7/23

O.K. for Payment J. McH Bigler.

PL. EX. 10 N ID. 10/22/47. [844]

Copy of Vendor's Bill

Vendor Pacific Tel. & Tel. Co.

June 11, 1946

444 Bush St.

San Francisco, Calif.

Shipper.....

.....

Consignee Schenley Distilleries

.....

.....

Invoice #YU 0473

Purchase Order #

Terms

F.O.B.

Freight Bill No.

Waybill No.

Car No.

| Description | Quantity | | Amount | |
|-----------------------|----------|------|---------|---------|
| | | Rate | Prepaid | |
| | Weight | | | Collect |
| 5/13 Stone Napa | | | .40 | |
| " " | | | .40 | |
| Perlman L A | | | 3.50 | |
| 5/14 909 S Car | | .20 | | |
| Perlman L A | | | 3.50 | |
| 5/15 Colton 196 | | | 2.75 | |
| AN 0145 LA | | | 1.35 | |
| xWhipple LA | | | 1.80 | |

Defendant's Exhibit R-3—(Continued)

| | | |
|------|--------------------------------|------|
| 5/16 | Linkstrom Selma | 1.25 |
| 5/20 | Beneamen Wash DC | 3.50 |
| | Morrison " " | 4.70 |
| | xWhipple LA | 2.70 |
| 5/22 | Balzer Cincinnati | 6.35 |
| | xWhipple LA | 3.15 |
| 5/23 | Bernstein PNX | 3.75 |
| 5/28 | xBalzer Cincinnati | 5.75 |
| | Morrison Wash | 6.50 |
| | Bahman S Car. | .25 |
| | Harrigan Selma | 2.40 |
| | " " | 2.90 |
| | xWhipple LA | 3.85 |
| 5/29 | Shasmas Frs | 5.05 |
| | Morrison Wash DC | 3.50 |
| 5/31 | Chalini ELK | .60 |
| | Nipchild ST HLN | 1.00 |
| | Vandorn TRLK | .75 |
| | xWhipple LA | 3.50 |
| | Morrison Wash DC | 4.70 |
| 6/3 | 909 S.Car. | .20 |
| | " " | .20 |
| | xWhipple LA | 5.25 |
| | Berg LVMR | .40 |
| | Raymond LA | 9.45 |
| 6/3 | Baglin S Car. | .25 |
| 6/4 | Perlman LA | 4.90 |
| | AN 12111 LA | 1.80 |
| | Reis MTC | .60 |
| | Lausmon OKDL | 1.15 |
| | Amenta BKFD | 1.96 |

Defendant's Exhibit R-3—(Continued)

| | | | |
|-----------------------|--------------------|-------|----------|
| | Harnta BKF | 1.95 | |
| | Palmer NY | 3.50 | |
| 6/5 | xBalzer Cincinnati | 9.95 | |
| | Perlman LA | 3.85 | |
| | Amenta BKFD | 3.65 | |
| | Reise MTCA | 1.35 | |
| 6/7 | 44219 S MTO | .15 | |
| | 909 S CAR | .20 | |
| | “ “ “ | .20 | |
| | “ “ “ | .20 | |
| | 77506 BkKFD | 1.55 | |
| | Lingstrom Selma | 2.15 | |
| | “ “ | 3.40 | |
| | Amenta Shafter | 2.75 | |
| 6/10 | Reise MTCA | .90 | |
| | 1426 LA | 3.45 | |
| <hr/> | | | |
| Total | | 1.35 | 144.05 |
| Tax | | .20 | 36.01 |
| Total Carried to Bill | | | \$181.61 |

Pl. Ex 11-N for Ideal

10/22/47

1 U S

Wednesday, June 5, 1946

R.T.H. Called about purchase of Argentine Glucose. Assigned to G. E. Baglin for immediate attention.

Thursday, June 6, 1946

R.T.H. called. I called R.H.B. re glucose Wired Many Blanc.

Defendant's Exhibit R-3—(Continued)

I called J.B.D. * * *. He called back * * *.

I called Whipple and told him that I was calling for Schenley to advise him that Schenley would not enter into contract with Engrow for purchase of glucose, etc.

Friday, June 7, 1946

Called R.T.H. Sent telegram to Whipple re glucose.

May 20, 1946

Harold A. Whipple Company
316 Commercial Street
Los Angeles 12, California

Dear Mr. Whipple:

This will confirm our telephone conversation of today on the subject of Argentine glucose.

We are interested in purchasing up to 1,000 tons. Shipments to commence May-1946 (if possible at this date)—50 tons; June through September—100 tons a month; October and November—275 tons a month. If your other prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the 1,000 tons.

It is understood that we will be purchasing by letter of credit direct from the Argentine shipper, cost to us not to exceed 22.3 cents a pound in wood barrels laid down, taxpaid, Pacific Coast port. It is further understood the glucose is crystal-clear obtained by incomplete hydrolysis of cornstarch, 43 to 45 Baume, with a balling of 81.8 upwards.

Just as soon as you receive a reply to your cable

Defendant's Exhibit R-3—(Continued)
to the shipper, which we understand will be by
Wednesday of this week, you will phone this office
and advise us that the shipping schedule reflected
above can be met.

We will be expecting information from you which
will enable us to issue our purchase order and cov-
ering letter of credit. Thank you very kindly for
the consideration you have given this matter.

Yours very truly,
SCHENLEY DISTILLERS
CORPORATION
R. H. Baglin

RHB:SR

Telephone
Mutual 4371

Cable Address
WHIPL
All Codes
(May 22 Recd)

Harold A. Whipple Co.
Importers-Exporters
316 Commercial Street
Los Angeles 12, California

May 21, 1946

Schenley Distillers Corp.
900 Battery Street
San Francisco 11
Calif.

attn Mr. R. H. Baglin

Dear Mr. Baglin:
confirming our telephone conversation of today re-

Defendant's Exhibit R-3—(Continued)

garding Argentine Glucose we quote from cable received today from our principals in Buenos Aires as follows:

“six hundred tons available price 1.375 (pesos per kilo) require twentyfive percent downpayment balance confirmed credit our order delivery hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm”

signed: Engraw

after our phone conversation we have replied as follows:

“accept 600 tons one thirty seven one half shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation”

signed: Whipl

We will advise you immediately we receive their reply.

As we stated we do not feel that they are justified in asking for a cash deposit as advance payment on a deal of this sort and would have so cabled them even before discussing it with you. We do not think that this will “gum up” the deal and have every expectation that they will confirm promptly and—we hope will be able to complete the 1300 tons for delivery in the last $\frac{1}{4}$ of the year.

Defendant's Exhibit R-3—(Continued)
to confirm the figures which we gave you:

The export exchange rate on Argentine pesos is
U\$100.00—335.82 pesos or US \$0.29778 per peso at
pesos 1.375 per kilogram—US\$ 0.4094575 per kg.
—\$0.18573 pre lb. (1 kg—2.2046 lb) freight rate
is \$25 per 40 cu ft—the barrels contain slightly less
than 15 cu ft with a net content of 660 lbs approxi-
mately

this will give an equivalent of

| | |
|--------------------------------------|------------------|
| approximately | \$0.0142 per lb. |
| insurance 1½% .30c per 100 lbs | .0030 |
| duty @ 2c per lb. | .02 |

giving a landed cost est. 22.293 per lb.

The letter of credit should be opened in favor of
Cia. Engraw Comercial&Industrial .SA

San Martin 329 Buenos Aires

through the First National Bank of Boston
Buenos Aires
by cable

covering the full amount in pesos at 1.375 pesos
per kilo net FOB Steamer Buenos Aires expi-
ration Oct 30th 1946 or as confirmed

(Quotations are subject to immediate acceptance
and change without notice. All agreements are sub-
ject to the contingencies of strikes, transportation
delays, government restrictions and other causes
beyond our control. Clerical errors subject to
correction.)

Defendant's Exhibit R-3—(Continued)

We trust that the forgoing is clear to you and that you can arrange your credit to Cia Engraw as soon as we advise you that we have their final confirmation of the sale.

Confirming our earlier conversation on this subject Cia Engraw has indicated that they will be in a position after Jan 1st to furnish from 300 to 500 tons monthly at the then prevailing market for glucose and we would appreciate your informing us if you would care to book this production for 1947?

As to quality this glucose is pure corn syrup, crystal clear, testing 43 to 45 Baume . we anticipate receiving a small sample by airexpress in a few days and will forward it on to you when received. Further we suggest that documents to accompany drafts under letter of credit should include a certificate of analysis as well as a certificate of inspection of the cooperage at time of loading, for insurance purposes.

Thanking you for your cordial cooperation in this matter and assuring you of our endeavors that this deal shall work out satisfactorily for all concerned, we beg to remain

yours very truly,

Harold A. Whipple Co.

By /s/ Harold A. Whipple

Defendant's Exhibit R-3—(Continued)

Telephone

Cable Address

MUtual 4371

WHIPL

All Codes

(May 24 Reed)

Harold A. Whipple Co.

Importers-Exporters

316 Commercial Street

Los Angeles 12, California

May 23, 1946

Schenley Distillers Corp

900 Battery Street

San Francisco Calif

attn Mr. Baglin

Dear Mr. Baglin:

Confirming our telephone conversation of this morning we quote the cablegrams received from Engraw in Buenos Aires as follows:

NLT Whipl 5-22

Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundred thirtyfive tons stop your use night letter lost julyaugust deliveries offered are working on this stop have closed June delivery fifty tons July sixty augustsept Twohundred september onehundredfifty october twoseventyfive november twohundred december twohundred stop as contract is in argentine pesos assume purchaser is covering forward exchange more details tomorrow."

Signed: Engraw.

LC Whipl 5-23

Defendant's Exhibit R-3—(Continued)

Urgent arrange immediately credit our order to cover sixhundred tons stop ask americanbank cable First Boston here so can meet requirement one supply source market today up five cents.”

Signed: Engraw. [859]

You will understand they confirm actual purchase for your account of 1135 metric tons of glucose in accordance with shipping schedule given. That they have committed their personal credit to the suppliers pending receipt of your letter of credit and that they require your credit urgently at the earliest possible moment to satisfy one of their sources of supply who demanded a 25% deposit to hold the lot for you.

Will you please ask your New York office to cable the credit as quickly as possible instead of air-mailing same? This is particularly important as the next boat starts loading about the 29th and will sail on June 9.

Your credit should call for a total of 1145 metric tons approx. before December 31st, allowing partial shipments, and your purchase order should show the shipping schedule given “or more.” We have cabled them again tonight asking them to try to improve the June July deliveries.

We await your confirming letter which you stated is in the mail today. Thank you for your cooperation.

Yours sincerely,

HAROLD A. WHIPPLE CO.,

/s/ HAROLD A. WHIPPLE.

Defendant's Exhibit R-3—(Continued)

Quotations are subject to immediate acceptance and change without notice. All agreements are subject to the contingencies of strikes, transportation delays, government restrictions and other causes beyond our control. Clerical errors subject to correction. [860]

Western Union

(55) DX

A. N. Williams, President

Symbols:

DL—Day Letter.

NL—Night Letter.

LC—Deferred Cable.

NLT—Cable Night Letter Ship Radiogram.

Class of Service:

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination.

May 27 PM 2 11

NE60 LG Ser PD-WUX New York NY 27 155P

J. B. Donnelly-Schenley Distilleries Inc.

900 Battery St. Sfran.

Please Wire Details Regarding Purchase Hundred Tons Glucose Argentine. Traffic Department Can Arrange Shipment from Buenos Aires Direct

Defendant's Exhibit R-3—(Continued)

to San Francisco Steamer Sailing June 12. Please Advise.

C. W. METCALF.

(The company will appreciate suggestions from its patrons concerning its service) [861]

Western Union 1220

A. N. Williams President

1946 May 27 PM 8 32

Long FE126 NL PD=Sanfrancisco Calif 27

C W Metcalf Schenley Distillers Corp=

WUX NYK=

Retel Argentine glucose. Name of shipper Cia. Engraw Commercial & Industrial S.A. Address San Martin 329 Buenos Aires. 1135 tons have been offered for shipping dates as follows. June 50 tons July 60 tons August-September 200 tons. Additional September 150 tons. October 275 tons. November 200 tons. December 200 tons. Letter of credit in favor of shipper through First National Bank of Boston. Buenos Aires covering fall amount in pesos at 1.375 pesos per kilo net FOB steamer Buenos Aires expiration December 31, 1946. Will be away from San Francisco remainder of week. Suggest you call R H Baglin for any additional information you may require. Regards=

J B DONNALLY.

#

PL. EX. 19-N for ID.

1135 X 2240 2,542,400

10/22/47

2,542 400 X 2239=566,700,96

Defendant's Exhibit R-3—(Continued)

The company will appreciate suggestions from its patrons concerning its service [862]

Mr. I. J. Seskis

May 28th, 1946.

Carl J. Kiefer

Cincinnati

Argentine Glucose—

K-5/28-1

Joe Donally has been negotiating thru the Harold A. Whipple Co., importers and exporters acting as agents for Cia. Engraw Commercial & Industrial S.A., San Martin 329, Buenos Aires, for some Argentine glucose for use in our cordials and liquers. The price of this material at Argentina is 1.375 (pesos per kilo) or about 18.6c per pound. We wish to purchase 600 tons of this material upon acceptance of a satisfactory sample and Donnelly is checking this portion. However, before we can close the deal it will be necessary to send a letter of credit thru the First National Bank of Boston, Buenos Aires covering the full amount. For this reason it would seem to be desirable to investigate this company before making a final closing with them. I would appreciate if you would look into the standing of Engraw and advise me at your earliest convenience.

CARL J. KIEFER

CJK:DW

PL EX. 20N ID. 10/22/47 [863]

Defendant's Exhibit R-3—(Continued)

Western Union 1201

(55) D X

1946 May 28 am 9 00

A. N. Williams, President

JA62 49 SER=WUX Cincinnati Ohio 28 1147A

J B Donnelly. Schenley Distilleries Inc=

900 Battery St Sfran=

Relet to Kiefer May 23. We are checking standing of company prior to issuance of letter of credit. In meantime work out arrangement with Whipple limiting commitment to six hundred tons based on acceptance of representative sample to be submitted. Further commitments to be decided at some future date

=Chas Balzer Schenley Distilleries Inc.

Talked to Whipple and passed same on to Balzer by phone.

JB

.23 The company will appreciate suggestions from its patrons concerning its service.

PL. EX. 21N ID 10/22/47 [864]

Schenley Affiliates

Inter-Company Communication

(May 31 1946)

| | | | |
|---------|------------------|-----------------|--------------|
| To | Mr. C. J. Kiefer | Date | May 29, 1946 |
| From | C. W. Metcalf | New York Office | |
| Subject | | File | |

The attached is a copy of a memorandum received

Defendant's Exhibit R-3—(Continued)
from Miss Duff in the Import and Export Department regarding Cia. Engraw Commercial & Industrial S.A. Evidently, this is not a manufacturer of corn syrup but an exporting outfit. Under these circumstances I would hesitate opening an irrevocable letter of credit in their favor covering our purchase of syrup. Will call you on the telephone next Monday regarding this matter.

/s/ C W M

P. S. Since writing the above, a second report has arrived on the above company which shows that they seem to be a very good house even though they are not manufacturers of corn syrup.

CWM:MB

All orders and deliveries are subject to the terms and conditions appearing on our standard order forms and invoices. All contracts must be in writing and signed by an executive officer of the company at its home office, and only such an officer is authorized to modify or waive the provisions of any contract. [865]

Schenley Affiliates

Inter-Company Communication

To: Miss Barr Date 5/29/46
From: M. R. Duff New York Office
Subject: Cia. Engraw File
 Commercial & Indus-
 trial S. A.
 San Martin 329

Defendant's Exhibit R-3—(Continued)

Buenos Aires,
Argentina

So far, the only information I could get is as follows:

Organized in March 1945

Capitalized at 1,600,000 Argentine currency for the purpose of exporting wool, hides, live-stock by-products.

President—G. F. Berger

V. P.—Louis G. Castelli

Director—Felix McGraw

All with good reputation.

This information is one year old.

Will telephone you later today if I can get later information.

M. R. DUFF

All orders and deliveries are subject to the terms and conditions appearing on our standard order forms and invoices. All contracts must be in writing and signed by an executive officer of the company at its home office, and only such an officer is authorized to modify or waive the provisions of any contract. [866]

Schenley Affiliates

Inter-Company Communication

To: Miss Barr

Date: May 29, 1946

From: M. R. Duff

New York Office

Subject: Cia. Engraw

File

Commercial & Industrial S.A.

Defendant's Exhibit R-3—(Continued)
 San Martin 329
 Buenos Aires,
 Argentina

The Engraw Export & Import Co. S.A., Montevideo, Uruguay bought all stock in subject firm in January 1946 for \$100,000. Their December 31, 1945 (before the made the investment in the Argentine firm) statement was as follows:

| | | | |
|---------------------|---------|-----------------------|---|
| Capital | 200,000 | Uruguayan pesos | |
| | | (at 55 to 60c a peso) | |
| Surplus | 122,000 | " | " |
| Current & total | | " | " |
| assets | 765,000 | " | " |
| Current liabilities | 113,000 | " | " |

In the opinion of a mercantile group, these Engraw people are one of the best in South America. Three Americans are the principals:

Mr. Berger who was formerly treasurer of Morristown, Pa. Trust Co.

Mr. McGraw is President of McGraw Wool Corporation of Pittsburgh.

Mr. J. F. Hosey is President of Energetic Worsted Corporation of Bridgeport, Pa. [867]

Two Argentines

Mr. Castelli

Mr. Iturraspi

are active in the business but not participating in the investment.

M. R. DUFF

Defendant's Exhibit R-3—(Continued)

The above information like that sent to you this morning was received by us over the telephone. M.R.D.

All orders and deliveries are subject to the terms and conditions appearing on our standard order forms and invoices. All contracts must be in writing and signed by an executive officer of the company at its home office, and only such an officer is authorized to modify or waive the provisions of any contract. [868]

Western Union (18)

A. N. Williams, Chairman of the Board.

Joseph L. Egan, President

| Class of Service | Symbols |
|---|---|
| This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address. | DL—Day Letter NL—Night Letter LC—Deferred Cable NLT—Cable Night Letter Ship Radiogram |

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination

JA207 25=Cincinnati Ohio 31 414P

May 31 PM 1 23

J B Donnelly=

Schenley Distilleries Inc 900 Battery St SFran=
Re Argentine Glucose. Please expedite sample air-

Defendant's Exhibit R-3—(Continued)

mailing same to Many Blanc Chicago care Mr Bayles as we can make no commitment until sample is approved=

Carl J Kiefer

*Blanc.

(Notation in script:) Spoke to Whipple. Sample is being obtained will be forwarded direct to Bayles. [869]

Western Union Western Union Western Union
Western Union

WU B38 INTL

CD Baires via All America 114/113 June 5

NLT Schenley Distillers

Cincinnati (Ohio).

Acting good faith Whipl Losangeles confirmation letter your Sanfrancisco office have contracted for 1135 tons glucose under specification crystalclear fortythree fortyfive degree baume USP stop To assure June delivery have purchased and paid for fifty tons laboratory test this lot density fifteen degrees Centigrad 1.447 dash 44 point 6 baume sotwo .027 percent crystal clear laboratory reports nocalcium all deliveries subject same testnto protect you all source same producer stop As credit was delayed obtained extension contracts because contractors satisfied Schenley purchaser now need credit immediately otherwise contractsxxxwill be cancelled with peanalties stop For refences Cain Chase National Chadsey First Boston wire credit

Defendant's Exhibit R-3—(Continued)

thru First Boston here.

ENGRAW

911A Jun 6

AIC Engraw.

Cain. [870]

Harold A. Whipple Co.

June 5, 1946

Many Blanc & Co Inc.

3414 West 48th Place

Chicago 32

Ill.

attn Mr Bayles

Dear Sir:

in accordance with request received from Mr Baglin, Schenley Distillers Corp. San Francisco, we are sending you via airmail, regestered, a small sample of Argentine Glucose which has been submitted by our principals in the Argentine as a representative sample of the glucose which they will ship to Schenley Distillers.

We trust that you will expedite the examination of this sample and render your report without delay.

yours very truly,

Harold A Whipple Co.

by.....

Harold A. Whipple

HAW/H

copy to Schenley San Francisco

2 " " Engraw

Defendant's Exhibit R-3—(Continued)

Mr Baglin

the above mentioned sample is the one mentioned in our conversation as received earlier from Engraw and which has just been returned to us by our client in the northwest. It just came in a few moments ago., and we hasten to forward it on [871] to Chicago.

In the meantime we are looking forward to receiving from you confirmation of specifications which will meet the approval of your Cincinnati office as understood in our phone conversation of this morning.

Harold A. Whipple Co. [872]

C W Metcalf
16799

Recd Cinti Jun 6/225P

Have Just Received The Following Cable From Buenos Aires Addressed To Schenley Distillers Cincinnati Quote Acting Good Faith Whipl Los-angeles Confirmation Letter Your San Francisco Office Have Contracted For 1135 Tons Glucose Under Specification Crystalclear Fortythree Forty-five Degree Baume USP Stop To Assure June Delivery Have Purchased And Paid For Fifty Tons Laboratory Test This Lot Density Fifteen Degrees Centigrad 1.447 Dash 44 Point 6 Baume Sotwo .027 Percent Crystalclear Laboratory Reports Nocalcium All Deliveries Subject Same Testn-to Protect You Allsource Same Producer Stop As Credit Was Delayed Obtained Extension Contracts Because Contractors Satisfied Schenley Purchaser

Defendant's Exhibit R-3—(Continued)

Now Need Credit Immediately Otherwise Contracts Will Be Cancelled With Penalties Stop For References Cain Chase National Chadsey First Boston Wire Credit Thru First Boston Here. Signed Engraw Unquote. Please Continue To Handle This Matter And Advise What Action Is To Be Taken.

Carl J. Kiefer. [873]

(PL. EX 28-N for Id. 10/22/47)

Western Union 1206

A. N. Williams President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

G-1508

June 7, 1948 10:50 a.m.

Harold A. Whipple Co.

316 Commercial Street

Los Angeles, California

Following Our Telephone Conversation Of Yesterday, And In Response To Your Request That Said Conversation Be Confirmed In Writing, We Advise That We Are Not Entering Into Any Agreement With Cia Engraw Comercial & Industrial SA For The Purchase Of Glucose.

Schenley Distillers Corporation

By: Jas. E. Woolsey

Assistant Secretary

Chg.

Roma Wine Co.

528 Market St.

PL. EX 31 N ID 10/22/47 [874]

Defendant's Exhibit R-3—(Continued)
 Western Union 1220

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time At point of destination.

NA 443 INTL—CD Baires Via All America

7 4/7 38

Cin—

1946 Jun 8 PM 6 10

You Received Ours Giving Specifications Of Contracts Purchased For Your Account And Laboratory Test June Shipment Glucose Stop We Believe We Are Entitled Courtesy Cable Reply Stop We Are Not Speculators And If You Dont Desire Coverage Will Liquidate But If Loss Occurs Must Protect Our Intersts Stop If Glocose Desired Please Cable Number Letter Credit Socan Proceed June Shipment Stop For Personal Reference Reuben Hays First National Cincinnati

BERGER ENGRAW..

PL EX 32 N ID 10/22/47

The Company will appreciate suggestions from its patrons concerning its service

PL. EX. 32N ID. 10/22/47 [875]

June 13, 1946

File Memorandum

Mr. Stanton of Stanton & Stanton, Wilcox Building, Los Angeles, telephone regarding the Argentine glucose matter. All he had to say was that there

Defendant's Exhibit R-3—(Continued)

were two methods under which we might proceed to get out of this commitment. Inasmuch as he did not have a firm offer of any kind, I asked him to develop that information as quickly as possible. He said that evidently Mr. Whipple did not understand what we required but that he, personally, would contact Engraw and would call us again tomorrow, Friday.

PL. EX. 34-N ID 10/22/47 [876]

Pl. Ex. 35 Id 10/22/47

Stanton & Stanton
Attorneys at Law
Suite 243-5-7 Wilcox Building
206 South Spring Street
Los Angeles, Calif.

Louis B. Stanton

M.S.

Edward B. Stanton

June 24, 1946

Schenley Distillers Corporation
Empire State Building
New York, New York
Attention Mr. Metcalf

Gentlemen:

In respect to the contract between yourselves, on the one part, and Compania Engraw Commercial & Industrial S.A. and Harold A. Whipple on the other part, for glucose to be shipped from Argentina:

Defendant's Exhibit R-3—(Continued)

We have today reviewed the entire correspondence, letters, cables and telephone conversations; with this in view, the writer today phoned to Mr. Berger at Buenos Aires, and as a result of that telephone call and our former communications, we state as follows:

The difference between the contract selling price to your corporation and the purchase price of the glucose in question—\$59,146.55

As a result of your refusal to comply with the contract, our people have suffered damages for cancellation in the sum of—31,750.00

A total damage of—90,896.55 [877]

As against this, you are entitled to 5 centavos difference between the F.A.S. and F.O.B. contract of—16,899.02

Net damage to our people to date of—
73,997.53

We wish to further advise that unless this account is settled promptly the cancellation costs will unquestionably increase, and thereby the loss to which our people have been placed will likewise increase.

You must understand that our people entered into contracts for purchase of glucose under the contract with you, in order to comply with your requirements as specified in your shipping instructions, and although we have done everything in our power to minimize the loss, the figure as stated of

Defendant's Exhibit R-3—(Continued)

\$31,750. is our least cost in case of present cancellation.

I understand that there is every expectation that the market will change so as to increase this loss. Please let us know immediately as to your disposition so that we can be advised as to further procedure.

Yours respectfully,

/s/ LOUIS B. STANTON

cc to your San Francisco office

lbs 1 [878]

Pl Ex 36 Id 10/22/47

M.S.

June 26, 1946

Mr. L. Stanton
Stanton & Stanton
Wilcox Building
Los Angeles, Cal.

Dear Mr. Stanton:

We have your letter of June 24, which refers to a contract between this company and Cia Engraw Commercial & Industrial, S. A. and Harold A. Whipple for glucose to be shipped from Argentina.

As we have informed you on the telephone, there is no such contract in existence.

Very truly yours,

SCHENLEY DISTILLERS
CORPORATION

C. W. Metcalf

CWM:MB [879]

Defendant's Exhibit R-3—(Continued)

All America Cables and Radio

Subsidiary of

American Cable and Radio Corporation

Largest American owned international telegraph system providing worldwide service by cable and radio.

Commercial Cables (Insignia) Mackay Radio

All America Cables and Radio

Warren Lee Pierson

67 Broad Street,

President

New York

The following message was received "Via All America"

Del 421 Jun1546

Q BSDE111/RJ1329 XY

Baires 22 14 SG

764

L C Schenley Distillers

NYK

Accordance Your Cable And To Eliminate Confusion Are Cabling Whipple Extend Uncancelable Commitments And Amount Liquidation Damages

ENGRAW

767

Ex 41-N Ident. 10/22/47 INS [880]

Western Union 1211

A. N. Williams President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

PLFF EX 42-N Id.

10/22/47 INS

Defendant's Exhibit R-3—(Continued)

Contents Phoned To Rivera.

RTH 7/12/46

GA

WU E43 Intl N Buenosaires Via WUcables 14/13

Jul 12 0940

L C Metcalf Schenley

Distillers NYK (350 Fifth Ave)

20-0/0 Lettercredit Margin Acceptable For Liquidation Program

ENGRRAW

925A.

20-0/0. . [881]

Compania

Engraw

Comercial E Industrial S. A.

Buenos Aires, R. Argentina

San Martin 329—3.0 Cable Address, ENGRRAW

U.T. 31—8311 Pl. Ex. 43-N Ident

T.T. 387 10/22/47 INS

September 18, 1946

Ralph Heymsfeld, Esq.

Schenley Distillers Corp.

350 Fifth Avenue

New York 1, New York

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we bought for your Company have finally refused to accept cancellation of the contracts. We

Defendant's Exhibit R-3—(Continued)
are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.

Very truly yours,

COMPANIA ENGRAW
COMERCIAL
E INDUSTRIAL S. A.

By /s/ G. F. BERGER
G. Fred Berger
President

GFB-gem

Registered Mail [882]

G. Fred Berger
Room 1807 (co 3318)
Hotel New Yorker
New York 1, N. Y.

Return Receipt Requested

Registered No. 380516

RALPH HEYMSFELD, Esq.
Schenley Distillers Corp.
350 Fifth Avenue
New York 1, New York

Registered

Return Receipt Requested

PL. EX. 43N ID 10/22/47

Rec'd 9/19/46 Thurs. 1135 a.m. [883]

Defendant's Exhibit R-3—(Continued)

Pl. Ex 44-N Id 10/22/47 INS

Schenley Distillers Corporation

September 29, 1946

Compania Engraw

Comercial E Industrial S.A.

San Martin 329

Buenos Aires

R. Argentina

Dear Sirs:

Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.

Yours very truly,

SCHENLEY DISTILLERS

CORPORATION

Ralph T. Heymsfeld

.....

Ralph T. Heymsfeld

CC Mr. C. Fred Berger

Room 1807

Hotel New Yorker

New York, N. Y. [884]

Defendant's Exhibit R-3—(Continued)

The undersigned declares that the article described on the other side was duly delivered on
, 19.....

Signature¹

Postmark of the office of destination
 of the addressee:

of the agent
 of the office
 of destination

.....

/s/ JOSE RUMJAY

.....

¹This receipt must be signed by the addressee, or, if the regulations of the country of destination so provide, by the agent of the office of destination, and returned by the first mail direct to the sender.

5-11654

Form 3811

Rev. 1-4-40

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. /s/ G. BERGER

(Signature or name of addressee)

2. /s/ SALMER

(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Defendant's Exhibit R-3—(Continued)

Date Of Delivery 9-21, 1946

U. S. Government Printing Office 16—12421

PL. EX. 44-N ID 10/22/47 [885]

(Pl. Ex 45-N Id. 10/22/47)

Compania

Engraw

Domercial E Industrial S.A.

Buenos Aires, R. Argentina

San Martin 329-3°

Cable Address:

U.T. 34-9344

ENGRAW

T.T. 387

September 20, 1946

Ralph Heymsfeld, Esq.,
Schenley Distillers Corp.,
350 Fifth Avenue,
New York 1, N. Y.

Dear Mr. Heymsfeld:

I am flying back to Buenos Aires in the morning. I regret very much our failure to come to an understanding with reference to the glucose contracts.

I wish to take this opportunity of assuring you that in cancelling our appointment for 9:30 September 18 you entirely misunderstood our motives in suggesting the first conference and the follow-up meeting which you cancelled. We had no idea at either meeting of attempting to build up our case. The facts that existed before the meeting were not and could not have been affected by the conference which we had, and could not have been affected in

Defendant's Exhibit R-3—(Continued)
any way by the meeting you cancelled. I thought
it best to confirm this to you so that there will be
no possibility of misunderstanding as to our inten-
tions.

Sincerely yours,
/s/ G. FRED BERGER.

GFB/T [886]

(Pl. Ex. 46-N Id. 10/22/47)

Law Offices
Mesirov and Leonards
1618-20 Packard Building

Harry S. Mesirov

Thomas C. Leonards

Leon I. Mesirov

Telephone:
Rittenhouse 2431

October 29, 1946

Ralph Heymsfeld, Esq.,
Schenley Distillers Corp.
350 Fifth Avenue,
New York 1, N. Y.

Dear Sir:

Referring to the letter dated September 18, 1946,
which you received from Compania Engraw Com-
mercial E Industrial S.A. to the effect that the
suppliers with whom they had contracted for the
1135 tons of glucose had finally refused to accept
cancellation of the contracts, and that Engraw was
proceeding to sell the glucose at best obtainable
prices, I beg to inform you on behalf of Engraw
that it has been unable to dispose of the glucose and

Defendant's Exhibit R-3—(Continued)

that, having resumed negotiations with the suppliers for the cancellation of the contracts, Engraw has finally offered to pay them an aggregate sum of \$78,000 for such cancellations. It now looks as though this offer will be accepted and, unless I hear from you to the contrary by return mail, I shall assume that you have no objection to the proposed settlement.

We will, of course, look to you for repayment of our loss.

Yours truly,
/s/ Harry S. Mesirov
Attorney for Compania Engraw
Commercial E Industrial S.A.

HSM:T [887]

[Envelope]:

Mesirov and Leonards

1018-20 Packard Building

(Postage)

Philadelphia 2

(Pl. Ex. 46-N Id. 10/22/47)

Registered 220588

Ralph Heymsfeld, Esq.,
Schenley Distillers Corp.,
350 Fifth Avenue,
New York 1, N.Y.

Registered Mail

Return Receipt Requested [888]

Defendant's Exhibit R-3—(Continued)

CB & DE

1. I do not wish to comit ourselves for over 600 tons on letter of credit—until we see quality.

2. Note test of 43-45 Baume—I believe the U.S. Product is much higher—please determine & if it is then we will not accept this offer.

(Pl. Ex 47-D Id. 10/22/47) [889]

All America Cables and Radio

Subsidiary of

American Cable & Radio Corporation

Largest American Owned International
telegraph system providing worldwide
service by cable and radio

Commercial Cables (Insignia) Mackay Radio

An I.T. & T. Associate An I.T. & T. Associate

Warren Lee Pierson, President

All American Cables and Radio

67 Broad Street, New York

The Following Message Was Received "Via All
America"

Del 259 Jun 30 46

ML2 NL T526 Baires 28 29

NTL C W Metcalf Schenley 350 Fifthave NY

Cable address Alvearotel Buenos Aires received
money RIO thanks

Dichter.

(Pl Ex. 49-N Id. 10/22/47.) [890]

Defendant's Exhibit R-3—(Continued)

Hand Knitting Top Dyed Single

Energetic Worsted Corporation

Manufacturers of

Worsted Knitting Yarns

Oil Skeins

Bridgeport, Montgomery County, Pa.

Phone—Norristown 4970

John J. Hosey, President August 27, 1946

(Handwritten notation:) Rie Engraw

Mr. Ralph Hymesfeld

Schenley Distillers Corporation

Empire State Building

350 Fifth Avenue

New York City

Dear Mr. Hymesfeld:

Wish to take this opportunity to thank you for promptly making yourself available for the appointment with our Mr. G. Fred Berger, President of Engraw, Buenos Aires, 2:30 P.M. Sept. 4th.

This letter will further serve to advise you of where to contact Mr. Berger during his visit to the United States. In the meantime, if you care to check with Mr. Charles Cain, Jr., Head of the Foreign Department of the Chase National Bank, we would appreciate you so doing.

Very truly yours,

ENERGETIC WORSTED

CORPORATION

/s/ JOHN J. HOSEY,

JJH:TJ

President.

(Pl. Ex. 56-N Id) (10/22/47) [891]

Defendant's Exhibit R-3—(Continued)

Engraw

Export & Import Companies

Engraw Export & Import Company S.A.

Montevideo, Uruguay

Engraw Exportadora—Importadora, Ltda.

Rio de Janeiro

Sao Paulo

Brazil

Cia. Engraw Comercial—Industrial S.A.

Buenos Aires, Argentine

August 27, 1946

(Handwritten notation: File Engraw)

Mr. Ralph Hymesfeld

Schenley Distillers Corporation

Empire State Building

350 Fifth Avenue

New York City.

Dear Mr. Hymesfeld:

As per the writer's telephone conversation with you today, this letter will confirm an appointment with our Mr. G. Fred Berger, President of Engraw, Buenos Aires, for 2:30 Wednesday afternoon, September 4th.

Thanking you for your consideration in this matter, remain

Very truly yours,

ENGRAW EXPORT & IMPORT
CO. S.A. MONTEVIDEO

/s/ JOHN J. HOSEY,

JJH:TJ

President.

(Pl. Ex. 57-N Id. 10/22/47) [892]

Defendant's Exhibit R-3—(Continued)

[Envelope]:

(3-cent postage stamp, with cancellation stamp: Buy
U.S. Saving Bonds. Ask Your Postmaster)

Engraw

Export & Import Companies

(Postmark:) Philadelphia, Pa.3

Aug. 28 1-AM 1946

Mr. Ralph Hymesfeld

Schenley Distillers Corporation

Empire State Building

350 Fifth Avenue

New York City

(Pl. Ex. 57 N Id. 10/22/47) [893]

(Pl. Ex. 58-N Id) (10/22/47)

August 27, 1946

Memorandum for the file

Mr. Hosey called me on the telephone from Pennsylvania.

He stated that he had called Mr. Metcalf and that Mr. Metcalf had referred him to me.

He said that he had an investment in the Engraw Company in Buenos Aires; that if I checked him with the Chase National Bank in New York I would find out that he was a responsible person; that he understood that there was a controversy between Schenley and Engraw concerning some glucose and he would appreciate being told by me what Schenley's position was in the matter.

I asked Mr. Hosey why he could not get the facts

Defendant's Exhibit R-3—(Continued)

from Mr. Berger and Mr. Hosey stated that he was having considerable difficulty in getting the facts from Mr. Berger and in understanding the transaction.

I told Mr. Hosey that Engraw had purchased some glucose and claimed to have a contract to sell the glucose to Schenley; that Schenley had never made a contract with Engraw although one was in negotiation with a man named Whipple in Los Angeles but that no contract had ever been concluded with Whipple or with Engraw.

I told him that we had received a letter claiming very [894] substantial damages but that I was at a loss to understand how Engraw had been damaged since Engraw had informed our representative that if Schenley would put up a letter of credit it would enable Engraw to conclude its purchase and then liquidate the glucose without loss. Mr. Hosey stated that he could not understand why a letter of credit would be needed from Schenley since Engraw had adequate funds to take care of the situation. He said in effect: "We have two or three companies down there and if there isn't enough money in the one company we have money in the other companies." Hosey then said that he thought he would have Berger come up to the United States to explain the transaction to him and he asked whether I would be willing to meet with Berger and himself. I told Hosey that as a personal courtesy to him I would be glad to meet with Mr. Berger and himself

Defendant's Exhibit R-3—(Continued)

Thanking you in advance and looking forward to seeing you on the 18th, I remain

Yours sincerely,

ENERGETIC WORSTED
CORPORATION

/s/ J. L. McMANUS

J. L. McMANUS

JLM:gsj

(Pl. Ex. 60-N-Id) (10/22/47)

(Pennant:) Army E Navy [896]

Pl. Ex. 61-N Id 10/22/47

September 11, 1946

Mr. J. L. McManus,
Energetic Worsted Corporation,
Bridgeport,
Pennsylvania.

Dear Mr. McManus:

We are in receipt of your letter of September 10th.

As a personal courtesy to Mr. Hosey, who called me on the telephone and stated to me that he was financially interested in Engraw, that he did not know all the facts of the Engraw glucose situation, and that he was having difficulty in getting them from Mr. Berger, I agreed to meet with Mr. Hosey. As a matter of fact, since Engraw and Whipple had referred the matter to counsel who made a claim on us by letter dated June 24, 1946, I would under no circumstances have considered a meeting with

Defendant's Exhibit R-3—(Continued)

Mr. Hosey for any other purpose. Mr. Hosey knew at the time of our telephone conversation that Schenley did not consider itself obligated in any way in connection with any purchase of glucose which Engraw may have made, and Engraw has been aware of the fact from the outset of the controversy, having referred the matter to counsel prior to June 24th, last.

At the conclusion of our September 4th meeting, Mr. Hosey [897] stated that he felt the situation had been fully discussed but that he would like to come back again on another occasion. He also stated that he wished Mr. Berger to show me photostats of the contracts which Engraw had made for the purchase of glucose.

You will recall that I told Mr. Hosey, Mr. Berger and yourself that I was willing to meet with you again if you desired it—and we fixed September 18th as a date which would be convenient to Mr. Berger—but that it would have to be clearly understood that our meeting again was not a recognition of any obligation in the transaction or any indication that our position was unclear or that we had any interest in the liquidation of the glucose.

Your presence at the meeting of September 4th, and the statements made by Mr. Berger at that meeting—particularly this statement that Engraw did not know Schenley's position in the matter—made me doubtful as to whether the purpose of the meeting was, as Mr. Hosey had stated, to inform

Defendant's Exhibit R-3—(Continued)

Mr. Hosey of the facts, or whether its purpose was, through the medium of continued discussion with us, to endeavor to develop a claim. This doubt is now, I feel, confirmed by your letter for which I see no other possible basis.

Under the circumstances, I see no need for any further meeting on this matter. [898]

Mr. J. L. McManus

2

9/11/46

Very truly yours,

RALPH T. HEYMSFELD.

Pl. Ex. 61-N Id 10/22/47

RTH:BD [899]

September 17, 1946

Memorandum for the Files

Mr. Berger called me on the telephone to-day. He said he had been to see Mr. Jacobi and Mr. Metcalf yesterday. He said he did not know until this morning about the interchange of correspondence which I had had with Mr. McManus. He said he was surprised at Mr. McManus' having written me because he (Berger) had the information which Mr. McManus was requesting of me. He said he would like to meet with me to-morrow and that if I desired I could write a letter or have a letter written for him that the meeting would be without prejudice to the rights of either side.

I told Mr. Berger that I saw no need for further meetings on the subject, that so far as I could see there was nothing he could say to me that would change our position, and that I was sure there was

Defendant's Exhibit R-3—(Continued)

nothing that I could say to him. Berger said that if that was my position there was nothing he could do about it but that he would like to meet again. I told him that I could see no purpose to be served by a meeting.

R.T.H.

Pl Ex 62-N Id 10/22/47

Ree [900]

(Please insert This End in Slot of Automatic Telegraph with Message facing outward)

(When placing this telegram in Automatic Telegraph please observe directions shown on the cover)

Western Union

A. N. Williams, President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

Number Check Charge to the Account Of Place
Date Time Filed

To New York, N.Y., June 11, 1948

Engraw Commercial & Industrial, S.A.

San Martin 329

Buenos Aires

Argentina

Replying your cable: Our negotiations have been carried on with Whipple Los Angeles who has been kept fully informed of our position. Regret exceedingly confused situation which has developed and suggest you advise me Schenley New York of ex-

Defendant's Exhibit R-3—(Continued)
tent of your uncancellable commitments. Also telephoning Whipple to-day.

Metcalf

Distillers

RTH:DMS

Please Write or Type Message Plainly within the border—use black ink or pencil—do not fold. [901]

San Martin 329

3er Piso

Buenos Aires

(Argentina)

U.T. 31—8311

T.T. 387

Compania Engraw

Commercial E Industrial, S.A.

Inter-Office Communication

From—Mr. G. Fred Berger

To—Mr. E. R. Dichter

Buenos Aires, August 2, 1946.

Subject: Glucose Contracts.

After numerous cables during April and May covering the subject of the sale of glucose thru Mr. Whipple in Los Angeles, we finally received a telegram under date of May 20th accepting for parties then unknown to us, an offer for 1300 tons which we had made on April 24th and May 9th.

We immediately replied advising Whipple that it was impossible to hold offers firm in a market for glucose such as this has been.

On May 21st, we advised Whipple by L.C. that

Defendant's Exhibit R-3—(Continued)

we had available, subject to prior sale, 600 tons at Arg. Pesos \$1.30 per kilo and outlined conditions of payment which included 25% deposit in cash and advised him also that we would endeavor to secure an additional amount up to the 1300 tons if he confirmed the price offered in this telegram, i.e. A.P. \$1.30. [902]

On the 22nd of May, we received a telegram from Mr. Whipple, accepting the 600 tons at \$1.30 and offering to accept the balance of the 1300 tons at the same price. In this cable he also advised us that Schenley was the purchaser and would open credit for the entire amount but without a cash deposit which had been requested in our telegram of May 21st, according to the requirement of the supplier.

Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible (our price being \$1.20 F.A.S. and our offer thru Whipple being at \$1.30 F.O.B. so that we had a F.A.S. F.O.B. cost of approximately five centavos, leaving a net to us of five centavos on our F.O.B. offer of \$1.30, subject of course, to special storage charges if deliveries did not coincide with steamer availability) and the suppliers now knowing Schenley as the purchaser dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.

Under date of May 22nd, we sent an N.L.T. advising Mr. Whipple that we had made the necessary

Defendant's Exhibit R-3—(Continued)
 arrangements for 1135 tons to be shipped as follows:

| | |
|------------------------|---------|
| June | 50 tons |
| July | 60 " |
| August-September | 200 " |
| September | 150 " |
| October | 275 " |
| November | 200 " |
| December | 200 " |

Contracts to cover this, were signed as follows:

| | |
|----------------|----------|
| 600 tons | May 23rd |
| 60 " | " 22nd |
| 200 " | " 23rd |
| 75 " | " 24th |
| 150 " | " 22nd |
| 50 " | " 27th |

Under date of May 23rd, 1946, your Mr. J. B. Donnelly at your San Francisco office, wrote to Whipple starting his letter "this letter will confirm our telephone conversation and your letter of May 21st" the acceptance being the original 600 tons mentioned earlier in this letter. However, as a P.S. to this letter, Mr. Donnelly added "since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows"; this shipping schedule is the same as we outlined in our telegram of May 22nd so that undoubtedly the body of his letter was dictated some time earlier

Defendant's Exhibit R-3—(Continued)

than the P.S. tho the entire letter was dated May 23rd.

I have mentioned these dates for the single reason that apparently there seems to be some doubt expressed [904] as to the order in which these contracts were made. We closed them after receiving Whipple's instructions that the sale had been made to Schenley and our advice to Mr. Whipple under date of May 22nd, via N.L.T. so stated, "acting on your cable 21st, have completed firm purchases for account Schenley Distilleries 1135 tons stop" and then we added the shipping schedule which Mr. Whipple must have received under day of May 23rd.

Mr. Donnelly confirms the acceptance of this offer, his letter being dated May 23rd but please note that Mr. Donnelly's letter of May 23rd confirms a telephone conversation and also Mr. Whipple's letter of May 21st. Mr. Whipple wired us on the 21st, via night letter, which we received the morning of the 22nd, advising us of the approval of the purchase of the entire amount up to 1300 tons and that Schenley would open their credit for the entire amount.

Accordingly, the question of the timing and dating of contracts appears to be one of whether or not there is good faith all around.

It is obvious that we acted in the completion of these contracts only on the strength of our dependence on the fact that this purchase was being made

Defendant's Exhibit R-3—(Continued)

for Schenley of whose credit I am fully familiar as a former banker.

Without attempting to enter into a controversy it would seem that if the present opinion is that we purchased [905] without authority from Schenley, then it seems only fair to point out that in Mr. Donnelly's letter to Mr. Whipple, he in turn, in his P.S., acknowledged and accepted "the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows" that shipping schedule having been sent by us to Whipple in our N.L.T. of May 22nd so that obviously there was an offer and an acceptance if there was no purchase for account of Schenley.

Under date of June 4th, we received the first telegram from Whipple advising us that apparently something had gone amiss with the contracts, the objection at that time seeming to be based on a required analysis of the glucose.

We immediately advised Whipple of the analysis of the purchase we had made and also advised that our purchase had been made within the requirement of 43-45 Baume U.S.P.

Then, on the 5th of June, I wired Schenley at Cincinnati (Mr. Whipple's wire noted Cincinnati headquarters were refusing to authorize the credit) quoting to them the purchases we have made and the analysis of the test of the spot purchase we had already made in order to be certain to cover their requirements advising them at the same time that

Defendant's Exhibit R-3—(Continued)

each delivery would be subject to a similar test for their protection.

Under date of June 6th, Mr. Whipple advised us that he had obtained a part of an earlier sample we had sent [906] him and forwarded this to the Schenley laboratory in Chicago.

Under date of June 8th, I sent a second wire to Cincinnati asking for a reply and under date of June 12th, we received an N.L.T. from Mr. Metcalf regretting the confused situation which had developed and suggesting that we advise him at New York of the extent of the uncancellable commitments.

After the exchange of various other telegrams under date of June 14th, I wired Schenley of New York that in order to eliminate further confusion, we were cabling Whipple the extent of uncancellable commitments and the amount of liquidation damages, having ascertained at this time that we could cancel the largest contract for a ten centavos per kilo payment.

Mr. Richter then reached Buenos Aires and made contact with us and as a result we sent a joint cable to Mr. Metcalf under date of July 8th, outlining in effect that it would cost approximately U\$S 45,000.— to cancel but if a letter of credit was opened (a 20% requirement of the total was later arranged) the cancellation penalty of U\$S 30,000— would be eliminated and this action would also provide the time for orderly liquidation over the contract period which is the balance of 1946.

Defendant's Exhibit R-3—(Continued)

We also expressed our belief that there need be [907] no loss in connection with the balance of the contract for if we act as the agent for Schenley to liquidate the contracts, we believe that unless something untoward and drastic were to happen, we should be able to liquidate the contracts without loss to anyone.

We also took up the matter by cable with Mr. Whipple in order to ascertain the minimum amount of commission for which he would settle and he has left the matter in our hands.

Later telephone conversations with Mr. Metcalf disclosed that apparently he was satisfied to leave the further decision in connection with liquidation or cancellation in our hands together with Dr. Victor Goytia, the Argentine member of the firm Momen, Freeman and Goytia.

We discussed this matter with Dr. Goytia who exchanged cables with his New York office but during Mr. Metcalf's absence, apparently the legal department chose to take a stand different than that taken by Mr. Metcalf and the situation then became complicated.

As of the end of July, it became necessary for us to assume that Schenley would wish to liquidate (which liquidation Messrs. Dichter, Goytia and Berger had jointly recommended) and in order not to be in violation of the contracts we had entered into for account of Schenley, we picked up a further 160 tons of glucose so [908] that we now

Defendant's Exhibit R-3—(Continued)

have approximately Arg. Pesos \$ 250.000— of our funds involved without requiring any advances up to this time.

But the major contractor is now pushing us for a decision as to whether we are cancelling or liquidating (and he is in a position to do so for there has been not deposited the required Schenley credit for 20% of the total contract) and it will be necessary for us to give him an answer shortly.

We personally cannot cancel without violating the contracts into which we entered for account of Schenley, and if we violate them—they having been registered with the Chamber of Commerce,—we might just as well go out of business.

On the other hand, based on our funds already involved in taking up the July commitments (and there are 300 tons available in August) we are not in a position to go forward without a complete agreement with Schenley either to liquidate or to cancel.

To summarize, on the receipt of knowledge that the purchaser of the glucose in question was Schenley, we were able to eliminate the requirement for a cash deposit and were able to complete arrangements for the purchase of 1135 tons on a delivery schedule outlined in our N.L.T. of May 22nd which Mr. Whipple must have relayed to Mr. Donnelly who [909] acknowledged and confirmed Schenley's acceptance of our offer, including in his acknowledgment the schedule of shipments which is the

Defendant's Exhibit R-3—(Continued)

same schedule we outlined in our N.L.T. of the night before.

Therefore, if it were to be a question of whether or not we purchased before Schenley confirmed (and this we did not do until we knew that Schenley was the purchaser) the offsetting question seems to be that the information we outlined in our N.L.T. of May 22nd had definitely to be relayed by Mr. Whipple to Mr. Donnelly or he would not have been in a position to acknowledge and confirm the purchases and to further outline the shipping schedules which were for the first time mentioned in our N.L.T. of May 22nd.

So, it would seem that we either purchased for account of Schenley or Schenley's representative completed an acceptance of our offer—it does not seem possible that both actions can be contended.

Assuming for the sake of this memorandum, that Schenley admits either legal or moral responsibility, then the joint recommendation of Messrs. Goytia, Dichter and the writer is that we liquidate the contracts to eliminate both the cancellation cost and any possible reflection on either Schenley or Engraw for not fulfilling the contract, in addition to which it is our belief that the liquidation can in all probability be arranged without loss to any one. [910]

Messrs. Goytia, Dichter and Berger feel that if an allowance for Whipple were made to the extent of U\$S 5,000.— plus U\$S 500.— cost, this would be entirely satisfactory to Whipple.

Defendant's Exhibit R-3—(Continued)

To further summarize, the cable which Messrs. Dichter and Berger sent to Mr. Metcalf under date of July 8th and added to it our suggested settlement for Whipple, the summarization would be as follows:

Local cost of cancellation as outlined in telegram—U\$S 45.000.—

Whipple's commission and expense allowance—U\$S 5.500.—

Total cost if cancellation is carried out—U\$S 50.500.—

If the recommended liquidation is carried out immediately, the need for payment of the cancellation fee is eliminated which reduces the cost by—U\$S 30.000.—

Net cost assuming that the contracts cannot be liquidated at better than 1.20—U\$S 20.500.—

In view of the fact that the government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 1.23/1.25 but we already have information from our broker of a large offer pending from the United States at 1.31 just as soon as export licenses are granted.

So, if it were not for this delay in the issuance of the export permits, I believe we could continue liquidation if we had nothing more than the 20% letter of credit pledged [911] to meet the contract requirements with the main supplier.

Defendant's Exhibit R-3—(Continued)

It is estimated that the export licenses should be coming thru shortly and under the circumstances we cannot help but feel that the major portion, if not all of the U\$S 20.500.— shown above as the net cost of liquidation will disappear as contracts are liquidated between now and the end of the contract period which is December 31, 1946.

Accordingly, we are most hopeful that Mr. Metcalf will agree to the suggested program of liquidation and will therefore arrange to have the letter of credit deposited and authorize us to proceed with the liquidation taking such steps as may be necessary to carry it thru successfully in accordance with the program already outlined by Messrs. Goytia, Dichter and Berger.

CIA. ENGRAW COMERCIAL
E INDUSTRIAL S.A.

G. FRED BERGER,
President.

GFB:MBF

(Pl. 64 N). [912]

DEFENDANT'S EXHIBIT T

Bronson, Bronson & McKinnon

1500 Mills Tower

San Francisco 4, California

GAirfield 1-7200

Attorneys for Defendant

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

COMMISSION TO TAKE DEPOSITIONS
ON WRITTEN INTERROGATORIES

The President of the United States of America:

To Any Consul, Vice-Consul, or Consular Agent
of the United States of America, residing in the
City of Buenos Aires, Republic of Argentina, or
to an Notary Public duly authorized under the laws
of the Republic of Argentina to administer oaths,
Greetings:

Whereas it appears to the Judge of the above
entitled Court that there are located within the City

Defendant's Exhibit T—(Continued)
of Buenos Aires, [913] Republic of Argentina, and
at the addresses set opposite their respective names,
each and all of the hereinafter named witnesses,
to-wit:

Dr. Mario Robiola, Reconquista 336, Second
Floor;

Dr. Eduardo Martinex Carranza, Reconquista
336, Second Floor;

Dr. Adolfo Magdalena, Lavelle 710;

and that each and all of said persons are material
witnesses in a certain action now pending in said
Court between the above named parties, we, in con-
fidence of your prudence, competence and fidelity,
have appointed, and by these presents do appoint
you a Commissioner to take the depositions of said
witnesses, and therefore we authorize and empower
you at certain dates and places to be by you for that
purpose appointed, diligently to examine each of
said witnesses in answer to the direct interroga-
tories and cross-interrogatories annexed to this
Commission, and upon the oath of each of said wit-
nesses first taken before you, which oath you are
hereby authorized to administer, and to cause the
said examination of each of the said witnesses to
be reduced to writing, and to cause the same to be
read to or by said several witnesses so deposing
and to be subscribed by each of said witnesses and
then to certify under your seal and signature and
make return thereof annexed to this Commission,
to the Clerk of the above entitled Court at the

Defendant's Exhibit T—(Continued)

Federal Building in the City [914] of Los Angeles, County of Los Angeles, State of California, United States of America, with all convenient speed, enclosed in a sealed envelope directed to said Clerk and forwarded to him by the usual channels of conveyance for mail.

Witness the Honorable Leon R. Yankwich, District Judge of the United States, this 13 day of April, 1948, and in the one hundred seventy-second year of the Independence of the United States of America.

EDMUND L. SMITH, Clerk

By /s/ EDWARD F. DREW,

Deputy Clerk.

Interrogatories numbered one to fourteen, inclusive, to accompany commission, and to be propounded to Dr. Mario Robiola, Dr. Eduardo Martinez Carranza and Dr. Adolfo Magdalena:

1. Please state your name, age, residence and occupation.

2. Please state length of time in which, and the places where you have followed your present occupation and therein give the extent of the operations of yourself or of any firm or office with which you have been associated in such occupation or operation.

3. Please state the names of all colleges which you have attended, degrees which you have attained, date of your admission to the practice of law. If you have heretofore [915] stated that you are an

Defendant's Exhibit T—(Continued)

attorney, state any official position which you have held or do now hold in the government and the general extent of your practice or that of any office in which, or with which, you are or have been connected, particularly relating to the subject of sales of personal property.

4. The defendant Schenley Distillers Corporation has pleaded as one of its defenses that the export of glucose from the Republic of Argentina to any other country was specifically prohibited by the laws of the Republic of Argentina Numbers 12.591 and 12.831, and Article 14 of Law Number 15.591, and by regulations and orders regularly passed and made thereunder so that it would have been impossible for plaintiff to perform the contract.

Will you please attached to this deposition a copy of each one of said mentioned laws and one copy of each regulation and order regularly passed and made under said respective laws.

The said respective laws and the respective regulations and orders thereunder may be evidenced by an official publication thereof by the Argentine Government, which you can identify in your answer to this interrogatory or by a copy attested by the official having legal custody thereof, or his deputy, and accompanied by a certificate that such official has its custody. All documents must also be [916] authenticated by usual certificate of the Consul, Vice-Consul or Consular Agent of the United States stationed in Argentina. There need be only one set

Defendant's Exhibit T—(Continued)

of these documents, attached to the answer of one of the answering witnesses. Reference may be made to said set by any other witness.

Unless said respective laws, regulations or orders specifically so provide, will you please state the date when each went into effect, the period of duration of each and whether or not there have been any repeals or other termination of any one or more thereof. In this respect, please identify and attach copies of any and all laws, rules or regulations affecting the effective dates, period of duration or termination or repeal of said laws, regulations, rules or orders, the sources upon which you give your opinion and reasons therefor. Be careful to designate in your answer the particular regulations and orders, if any, passed under each particular law. Said respective laws and the respective regulations and orders thereunder may be evidenced and certified as hereinabove in this interrogatory specified.

5. Other than those above stated, were there any rules, orders, decrees or regulations, verbal or written, including, without limitation, such as were intradepartmental or internal, issued by or made by or emanating from the [917] Department of Industry and Commerce or any official thereof during the period May 1, 1946, to December 31, 1946, affecting the export of corn syrup glucose of any kind or nature whatsoever?

If so, attach a copy thereof to your answer to this deposition in form as hereinabove, in interoga-

Defendant's Exhibit T—(Continued)

tory 4 described. Or, if any such rule, order, decree or regulation was verbal, please state the terms and provisions of the same.

6. If your answer to question 5 is in the affirmative, please state the status in law of such rules, orders, decrees or regulations, verbal or written, including, without limitation, such as were intra-departmental or internal, as you have described, and state whether the same legally restricted or prohibited the issuance of export licenses for the commercial shipment of glucose during the period the same was in effect.

7. Have there been any interpretations of these or any of the laws, rules or regulations with respect to export licenses by any of the courts, executive or administrative officers of the Republic of Argentina relative to the grant or procurement of export licenses during the period of this contract?

8. In case your answer to question 7 is in the affirmative, please state fully such interpretations. If in [918] writing, attach copies thereof, certified as hereinabove, in interrogatory 4, specified.

9. The plaintiff in this action counts upon a contract, the portion of which essential for the purpose of this deposition is set forth in letter of date May 23, 1946, which is attached to the amended complaint on file, as Exhibit "A" and also hereto attached. In your professional opinion, under the provisions of the law applicable to the particular period, form and term of this contract, would it

Defendant's Exhibit T—(Continued)

have been legally impossible for plaintiff to have performed the matters and things by it to be performed at the specific times performance thereunder was due?

10. In case you have given your opinion in answer to the foregoing interrogatory herein, please state the reasons for said opinion, and if there have been any decisions in the Argentine courts thereon, please cite such decisions.

11. In your professional opinion, will you please state the difference between a law of the Republic of Argentina, a decree thereof, and regulations and orders, and therein state the reasons for your opinion.

12. In case there are found to be variances or conflicts between any of these respective regulations or orders and laws applicable thereto and under which they are made, please state that which in your professional opinion prevails, and in this respect state the reasons for such [919] opinion. In case there have been any court decisions thereon, please cite said decisions.

13. On June 7, 1946, the defendant Schenley Distillers Corporation delivered to plaintiff a telegram stating that it would not enter into any agreement with plaintiff for purchase of glucose. In your professional opinion, under the existing laws of the Republic of Argentina, would this fact alter any opinion which you have heretofore in this deposition given?

Defendant's Exhibit T—(Continued)

14. If you have given your opinion in answer to the preceding interrogatory, please state herein the reasons for said opinion and therein cite and set forth any court decisions which you may deem applicable thereto.

Dated: March 15, 1948.

BRONSON, BRONSON &
McKINNON

EDGAR H. ROWE

Attorneys for Defendant

“EXHIBIT A”

Schenley Distillers Corporation

850-900 Battery Street

San Francisco 11, California

Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California.

Attention: Mr. H. A. Whipple [920]

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S.A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage

Defendant's Exhibit T—(Continued)

containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS
CORPORATION

/s/ J. B. DONNELLY
J. B. DONNELLY

JBD:LP

P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial [921] S.A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

Defendant's Exhibit T—(Continued)

Stanton & Stanton

740 South Broadway

Suite 1004-09

Los Angeles 14, California

Phone: TRinity 3266

Attorneys for Plaintiff

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S.A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

a corporation,

Defendant.

CROSS-INTERROGATORIES

Cross-interrogatories to be propounded to each of
the following named persons:

Dr. Mario Robiola, Dr. Eduardo Martinez Caranza and Dr. Adolfo Magdalena, at the City of Buenos Aires, Republic [922] of Argentina, before the Consul, Vice Consul or Consular Agent or Notary Public, to take the deposition of each of said witnesses on behalf of defendant in the above entitled action.

Defendant's Exhibit T—(Continued)

To Defendant's Interrogatory No. 5:

In case your answer to this interrogatory is in the affirmative, please state:

(a) The particular sources upon which you base your answer, and therein give the name and official position of anyone who informed you of any verbal or oral rule, order or regulation.

(b) Please give the specific date and place where, and the parties present, when you were informed thereof.

(c) Please give the date when such verbal or oral rule, order, decree or regulation was made, by whom it was made, what official position, if any, he had at the time of making it, the effective date thereof, and the duration thereof.

(d) Please state whether such verbal or oral regulation, rule, order or decree was made public. If so, describe in detail when and in what way.

(e) Please give the authority in any law, statute or decree of the Argentine Republic under and by which any such verbal or oral order, rule, decree or regulation is made or upon which the official relied in making it.

(f) Is there any record or minute in any office of any department of any such verbal or oral rule, order, regulation [923] or decree? If so, attached a full, true and correct copy of the whole thereof, duly certified as required under direct interrogatory No. 4, and state the particulars of how you have obtained such instrument.

Defendant's Exhibit T—(Continued)

To Defendant's Interrogatory No. 6:

(a) Are you acquainted with the provisions of Article 17 of the Civil Code of Argentina?

(b) If you are so acquainted, please quote fully the provisions of said article.

(c) If you have stated that verbal or oral decrees, rules, orders or regulations have been issued and they, in any manner, have restricted by their operation or prohibited the issuance of export licenses, or have in any respect affected the export of glucose, please give in detail each and every authority upon which you rely in the law or court decisions of any courts of the Argentine Republic which you claim support your opinion that oral or verbal rules, orders, decrees or regulations have any effect as to private or commercial shippers.

(d) If you have stated that intradepartmental or internal rules, orders, decrees or regulations issued by or made by, or emanating from the Department of Industry and Commerce or any official thereof, affected the export of glucose in any manner, please give in detail each and every authority upon which you rely in the law or court decisions in the Argentine [924] Republic which you claim support your opinion that such intradepartmental or internal rules, decrees, orders or regulations have any effect as to private or commercial shippers.

(e) Please state in detail the requirements as to publicity as to the publication of any and all orders, rules, regulations and decrees.

Defendant's Exhibit T—(Continued)

(f) In case it was established as a matter of fact that exportation of glucose was actually made in each of the months commencing with the 1st day of May, 1946, and extending to the 31st day of January, 1947, would this in any respect alter any of your opinions herein given?

(g) Would the fact of the exportation during said months show or tend to show the interpretation made by executive or administrative officers of any or all of the rules, regulations, decrees or orders, whether written, oral or verbal?

(h) In case in your answer to interrogatories Nos. 4 and 5, or either of them, you have stated that rules, regulations, orders and decrees have been made, please give a detailed answer as to which particular order, decree or regulation in your opinion operated to legally restrict or prohibit the issuance of export licenses for glucose and further state if in your opinion such ban was valid, and give the basis of authority upon which you rely in such opinion. [925]

To Defendant's Interrogatory No. 9:

(a) Will you please state the authorities or other text-writer, or court opinion upon which you base any opinion given in response to direct interrogatory No. 9.

(b) In case your answer to said defendant's direct interrogatory No. 9 is that in your opinion it would have been legally impossible for plaintiff to perform the matters and things by it to be per-

Defendant's Exhibit T—(Continued)

formed at the specific times performance thereunder was due, please state fully and in detail the grounds upon which you base your opinion and therein cite any and all decisions of the courts of Argentine or any text-writer upon which you may rely, giving the name of the case and book and page where it may be found, or name of text-writer, title of book and page or section.

General Cross-Interrogatory No. 10:

- (a) Do you know of a Boletin Official?
- (b) If so, where and how often is it issued?
- (c) Is it issued under authority of any law of the Argentine Republic?
- (d) If your answer to the last is in the affirmative, quote at length the specific law or decree relative to said Boletin Official with special relation to laws, rules, regulations or decrees that are required to be published therein.
- (e) In case any law, rule, regulation, order or decree is [926] not published in said Boletin Official, what is the legal status thereof under the laws and court decisions of the Argentine Republic?
- (f) Specify the date of publication in the Boletin Official of each and every law, decree, order, rule or regulation to which you refer in your answer to any and all of the foregoing interrogatories and cross-interrogatories.

STANTON & STANTON

By LOUIS B. STANTON

LOUIS B. STANTON

Attorneys for Plaintiff. [927]

DEFENDANT'S EXHIBIT T-1

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S.A., a Corporation,
Plaintiff,
vs.

SCHENLEY DISTILLERS CORPORATION,
a Corporation,
Defendant.

INTERROGATORIES
and
CROSS-INTERROGATORIES

Deposition of Mario Robiola, taken before me, Fred H. Hauser, Jr., Vice Consul of the United States of America at Buenos Aires, Argentina, at 9:30 a.m. on May 10, 1948, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Mario Robiola, could not intelligently testify in the English language, and did well understand the Spanish language, one Elsa Zabala, who also well understands said Spanish language, was employed as interpreter and was sworn as follows:

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

“You do solemnly swear that you will truly and faithfully interpret the oath and questions to [928] be administered to Mario Robiola, a witness now to be examined, out of the English language into the Spanish language and that you will truly and faithfully interpret the answers of the said Mario Robiola thereto, out of the Spanish into the English language.”

and said Elsa Zabala interpreted accordingly.

The answers of the witness, Mario Robiola, to said interrogatories and cross-interrogatories were taken down stenographically by Elsa Zabala, of Avenida Quintana 337, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Mario Robiola, a witness now to be examined. So help you God.”

Mario Robiola of Callao 1375, Buenos Aires, Argentina, 45 years of age, lawyer, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

deposes and says:

Answers by Mario Robiola to Interrogatories.

To the First Interrogatory, he says:

Mario Robiola, 45 years of age, address Callao 1375, Buenos Aires, occupation lawyer.

To the Second Interrogatory, he says:

I was received as a lawyer in the city of Buenos Aires in 1925, and I am a partner in the law firm of Severgnini, Robiola and Garber, since that date, at which time this firm was established.

To the Third Interrogatory, he says:

I went to the "Colegio Sarmiento" (High School), and I was graduated as a lawyer at the "Facultad de Derecho de Buenos Aires" (Faculty of Law of Buenos Aires), where I was assistant to the Centre for Study of Legal Proceedings. I was admitted to the practice of law in August, 1925. I have not held, nor do I hold any official position. As a law firm we represent, among other firms, the Manufacturers Trust Company of New York, and have numerous contacts with the United States of America. We are connected with personal properties, especially with the Sayer Company, Inc. and with high grade Foods Products Inc.

To the Fourth Interrogatory, he says:

The export of glucose was not specifically prohibited by any of the laws referred to in the questionnaire. I attach hereto copies of laws 12591 and

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

12830, and 12983. Exhibits 1, 2, 3. Law 12831 has probably been cited in error, [930] as it has no bearing on the subject matter of this suit (it refers to the declaration of a National Holiday on August 12th.) There is no law 15591 in existence, and doubtless reference should have been made to Article 14 of law 12591. There are no copies available of Official Publications containing these laws, for which reason they have been copied and will be presented legalised.

To the Fifth Interrogatory, he says:

When war was declared Law 12591 was promulgated, which gave full powers to the Executive Power to adopt whatever measures they might consider necessary in order to regulate the cost of living. In July, 1944, the Government created the Secretariat of Industry and Commerce, and they were empowered to take direct intervention in all the existent problems of the day, including the granting of export permits, fixing of export quotas, etc. while they made a study of the situation as regards the supply of raw materials, and other articles which would affect the cost of living. As an outcome of this it was decided to investigate the glucose situation, and the Secretary of Industry and Commerce, Mr. Rolando Lagomarsine, gave a verbal order to suspend the shipments of glucose, and requested that all permits which had been granted, but not turned over yet to the exporters, be withheld, until a definite resolution had been taken. As

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

this was a verbal order and I was not present when it was given, [931] I am not able to attach a copy of the order, nor to supply the exact text, but I do know from information which has been given me, that the order was a very definite one and carried complete authority.

To the Sixth Interrogatory, he says:

The legality of this verbal order is beyond discussion: law 12591, and those laws which were later passed 12830 and 12983, gave the Executive Power complete authority to intervene in all problems concerning exportation and importation. Another matter to be considered, is that from 1943 the Argentine Republic was under the rule of a *de facto* Government, that is to say, there was no Legislative Power, and, as a consequence, all public affairs were handled by the body known as the National Executive Power, and this entity was empowered to dictate whatever measures it deemed necessary. It should be taken into account that only from 4th. June, 1946, was the Constitutional system of the country normalised. Law 12924 of 13th. January, 1947, ratified and confirmed the creation of the Secretariat of Industry and Commerce, and recognised all measures passed and adopted by this institution, therefore, the verbal order given regarding the export of glucose must be considered completely legal from all viewpoints.

To the Seventh Interrogatory, he says:

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

I do not know of any judicial questions having arisen [932] during the period referred to, regarding the granting of export licenses, but I am quite sure that in certain instances the Courts have admitted that the Executive Power is entitled to prohibit exportation of whatever product they may consider necessary.

To the Eighth Interrogatory, he says: .

This question is answered by my reply to No. 7.

To the Ninth Interrogatory, he says:

Yes. The actor could not possibly have complied with the contract as he was prohibited from so doing by the resolution passed by the Secretariat of Industry and Commerce, which went into effect 1st. May, 1946, and forbade the exportation of glucose.

To the Tenth Interrogatory, he says:

My opinion is based on Articles 513 and 514 of the Argentine Civil Code, which state (Mr. Robiola read from notes) "The debtor will not be responsible for damages and interests which may originate through lack of compliance with his obligation, when this is due to fortuitious circumstances or force majeure, that is unless the debtor should have accepted responsibility for the consequence of fortuitious circumstances, or that these should have been caused by his fault, or conditions already constituted by delay not due to fortuitious circumstances or force. [933]

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

Answers by Mario Robiola to Cross-Interrogatories.

To the First Cross-Interrogatory (to Defendant's Interrogatory No. 5) he says:

A) The information was given to me in the offices of the Secretary of Industry and Commerce, Mr. Rolando Lagomarsino, which I visited at the end of June or beginning of July, 1947. The name of the person who gave me this information is a Mr. Cofrancesco.

b.) I cannot give the exact date, I repeat it was at the end of June or beginning of July, 1947. There were other people present, but I cannot say who they were, because at the time I did not consider it necessary to document myself in this connection.

c.) Regarding the information given me, I would say I was advised that the order had been a verbal one given by Mr. Rolando Lagomarsino, in his capacity as Head of the Secretariat of Industry and Commerce, and this order was to be effective as from 1st. May, 1946, until a study had been made of the maize market, and of glucose in particular. The first resolution covering this subject was dictated 29th. August, 1946, No. 4484/46, and this was immediately followed by another resolution passed on 18th. September, 1946, No. 7499/46, copies of which I attach.

d.) I do not know in what form this order was

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

made public, however, the Export Division of the Secretariat of Industry [934] and Commerce was fully aware of the order, and as a result would not grant any export permits for the shipment of glucose during the period when this order was in effect.

e.) There is not in the Argentine Republic any special disposition which foresees the possibility of verbal resolutions, but in many cases, especially during the last few years, many verbal resolutions have been dictated and remain in effect while the definite resolutions are being studied before being finally passed.

f.) I do not know of the existence of any record of verbal orders.

To the Second Cross-Interrogatory (to Defendant's Interrogatory No. 6) he says:

a.) Yes.

b.) I quote from Article 17 of the Argentine Civil Code (Mr. Robiola quoted from a copy of this article):

“Laws cannot be derogated in their entirety or in part except by other laws. Usage, custom or practice cannot create rights except when laws refer to them.”

c.) I do not know of any decision of the Courts on this question, I wish to repeat, however, that the Secretariat of Industry and Commerce had complete authority to prohibit or in any other way to regulate the exportation of glucose or any other

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

product, so much so that any one who wished to export any product had first to obtain an export permit from [935] the Export Division of the Secretariat of Industry and Commerce. If the Secretariat of Industry and Commerce did not consider it was necessary to put this understanding in writing, this is a matter which has no connection with the validity of the order.

d.) I refer to my reply to the previous question.

e.) In accordance with Argentine legal requirements only laws must be published in the Boletín Oficial, but it is not legally required that orders or resolutions emanating from the various Ministries be also published in this manner.

f.) Only in the event that due to some exceptional circumstance the order to export had been made by some official institution, such as I.A.P.I. (Instituto Argentino de Promoción del Intercambio). It could also be the case that shipments were made after the prohibition for the export of glucose was in force, that is, 1st. May, 1946, but this would be because export permits once granted (and handed over to exporters) are valid for 180 days from date of granting.

g.) I do not think so because, as already stated, the prohibition covering the export of glucose was to remain in effect during the period that a study was being made of the market, and until a definite resolution was passed, and this was done as already mentioned in August and September, 1946.

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

h.) As already stated, the Secretariat of Industry and [936] Commerce was fully empowered to regulate all importation and exportation of the Argentine Republic, and as a direct result of this were able to prohibit the exportation of glucose. I wish to add that such resolutions were dictated, as is known in the Argentine, covering many lines of commerce.

My statements are based on the study I have made of this interrogatory.

To the Third Cross-Interrogatory (to Defendant's Interrogatory No. 9) he says:

a.) In answering No. 9, I consider that the prohibition of the export of glucose constituted a case of force majeure, and that under these conditions the contract could not have been complied with, on account of the unsurmountable obstacle which existed, that of a governmental resolution. The impossibility of compliance with a contract is the essence of fortuitious circumstances, as stated by Planiol "Elemental Treatment of Civil Law, Volume 2, No. 231, page 90; Bruzin "Essay on the idea of foreseeing", page 24 and those following; Polaco, "Obligations in Italian Civil Law", volume 1, page 333, No. 63; Bonnecase, "Supplement to theoretical and practical treatment of Civil Law; De Baudry "La Cantinerie", No. 272, page 539; Salvat "Obligations in General", page 70, No. 146; Argentine Jurisprudence, volume 13, page [937] 220.

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

To the General Cross-Interrogatory (to Defendant's Interrogatory No. 10) he says:

a.) Yes.

b.) In Buenos Aires, every working day.

c.) The Boletin Oficial was created by law 438 of the 5th. October, 1870; this law was derogated on the 15th. October, 1897, by law 697. The definite creation of the Boletin Oficial was effected on 2nd. May, 1893, by decree.

d.) The decree of 1893 stated that the Boletin Oficial would be the official organ for the publication of laws, decrees, resolutions, reports and all other data showing the state and movement of National administration. It will also publish all laws, decrees and acts of the National Executive Power which are of public character, and which will be delivered to them by the Press office of the President of the Nation, Decrees 659 of 14th. January, 1947 and 10893 of 24th. April, 1947.

e.) By publication in the Boletin Oficial it is presumed that the subject matter is known to all, but it is not imperative that all resolutions be published in the Boletin Oficial, and this is the case of many resolutions of the various Government officials and offices, but this fact of non-publication does not prevent these resolutions from being considered completely legal. The 21st. December, 1935, the Federal Chamber of the Capital dictated a sentence [938] declaring that the lack of publication of a law in the Boletin Oficial does not prevent it

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

from being valid, publication in any other organ may be considered effective. I attach a copy of this sentence. It was also declared by the Courts that the reading over the radio of a Government decree may be considered sufficient publicity, and the law is valid and in full effect.

f.) The dates of laws and the dates of their publication in the Boletin Oficial have been given in the course of my answers, whenever this information was obtainable. majeure." Article 514 "A fortuitious circumstance is one which could not have been foreseen, or if foreseen could not have been prevented."

In this case it was a fortuitious circumstance and force majeure because the Government dictated an order which prohibited the exportation of glucose. The course have considered as cases of force majeure, among others, the following.

a. The suspension of the production of a salt mine by a competent authority;

b. An order from the Executive Power forbidding the Municipality from continuing to collect a tax on silt, sand and gravel;

c. An order from the Executive Power forbidding the occupation of lands which are considered to be [939] under national jurisdiction, despite a municipal concession to the contrary.

It was finally declared that "force majeure exists when a Government forbids, during time of war,

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

exportation of goods by firms which are on their black list." I, therefore, consider that force majeure existed in the case of the contract referred to in Exhibit "A", and that under these circumstances, compliance with same was absolutely impossible.

To the Eleventh Interrogatory he says:

A law is passed by the Legislative Power and is then promulgated by the Executive Power. A decree is dictated only by the Executive Power. Regulations, orders and resolutions are dictated by the respective Departments, Ministries and Secretariats, and are passed in order that they may each better carry out their respective functions. The reason for my opinion is my knowledge of Argentine law.

To the Twelfth Interrogatory he says:

In the Argentine Republic this problem has been foreseen, and taken care of by Article 31 of the National Constitution which states that a law comes first, providing always that it is constitutional. There can be no conflict between a decree and a law, as whatever the Executive Power decides on the exportation or importation of products, is considered constitutional. There have been no Court decisions. [940]

To the Thirteenth Interrogatory he says:

No, because in June 1946, there was in existence the order which prohibited the exportation of glu-

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

cose, and on account of force majeure the contract could not be complied with.

To the Fourteenth Interrogatory, he says:

The answers I have given are based on my knowledge of Argentine law, and my experience during 23 years of law practice. Consideration should also be given to conditions prevailing in the Argentine Republic, which are well known, and, I would even say, axiomatic.

/s/ MARIO ROBIOLA

Mario Robiola

Witness

/s/ ELSA ZABALA

Elsa Zabala

Interpreter

/s/ FRED H. HAUSER JR.

Fred H. Hauser Jr.

Vice Consul of the

United States of America.

DEFENDANT'S EXHIBIT T-2

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E.

INDUSTRIAL S. A., a Corporation

Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION,

a Corporation

Defendant.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Eduardo Martinez Carranza, taken before me, Fred H. Hauser, Jr. Vice Consul of the United States of America at Buenos Aires, Argentina, at 9.30 a.m. on May 11, 1948, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division in the above entitled cause.

It appearing that the witness, Eduardo Martinze Carranza, could not intelligently testify in the English language, and did well understand the Spanish language, one Elsa Zabala, who also well understands said Spanish language, was employed as interpreter and was sworn as follows:

“You do sloemnly swear that you will truly

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)

and faithfully interpret the oath and questions [942] to be administered to Eduardo Martinez Carranza a witness now to be examined, out of the English language into the Spanish language and that you will truly and faithfully interpret the answers of the said Eduardo Martinez Carranza thereto, out of the Spanish into the English language.”

and said Elsa Zabala interpreted accordingly.

The answers of the witness, Eduardo Martinez Carranza, to said interrogatories and cross-interrogatories were taken down stenographically by Elsa Zabala, of Avenida Quintana 337, Beunos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Eduardo Martinez Carranza, a witness now to be examined. So help you God.”

Eduardo Martinez Carranza of Rodriguez Pena, 1271, Buenos Aires, Argentina, 33 years of age, lawyer, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
deposes and says: [943]

ANSWERS BY EDUARDO MARTINEZ
CARRANZA TO INTERROGATORIES

To the First Interrogatory, he says:

Eduardo Martinez Carranza, 33 years of age, address Rodriguez Pena 1271, Buenos Aires, Argentina, occupation lawyer.

To the Second Interrogatory, he says:

11 years as a lawyer, 10 years as a lawyer in the city of Cordoba, and since 1947 I have exercised my profession in the city of Buenos Aires, and am associated with the firm of Severgnini, Robiola and Garber. I have dealt principally with civil and commercial matters.

To the Third Interrogatory, he says:

I followed High School course at the 'Colegio Nacional Montserrat', one of the oldest schools in the country. I followed University studies at the Law School in the city of Cordoba, where I obtained my law degree, and also a degree in Law and Social Science. I was admitted to the Bar in January 1937.

I was Deputy in the Provinde of Cordoba during 1946, and professor for Civil law at the University of Cordoba. I was also a member of the Council of the Law School in Cordoba, and also a member of the Board of Directors of the Collete for Lawyers of the Province of Cordoba, which is an official institution. This institution accords or denies, ac-

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
cording to each case, permission to lawyers to [944]
exercise their profession.

While I practiced law in Cordoba, I represented important companies of the Argentine and of the United States of America, among those of the United States I might mention Pan American Airways, Warner Brothers, Universal Pictures and other movie companies.

In Buenos Aires I am associated with the law firm of Severgnini, Robiola and Garber, who represent, among other important firms, the Manufacturers Trust Company of New York.

To the Fourth Interrogatory, he says:

Dr. Robiola has attached copies of law 12591, 12830 and 12983. Law 12591 was promulgated on 8th September, 1939, and published in the Boletin Oficial on the 11th. September, 1939, and has been in force until 3rd. June, 1946. Law decree 16216 was passed on 3rd. June, 1946, (Exhibit 4) and was in force until 23rd. August, 1946. Law 12830 was promulgated on 23rd. August, 1946, and published in the Boletin Oficial on the 16th. September, 1946, and is actually in force, with modifications made by law 12983. Law 12830 will be in force until 3rd. June, 1952. Law 12983 was sanctioned on 30th. April, 1947, and promulgated 3rd. of May, 1947; it was published on the same day in the Boletin Oficial. The laws mentioned do not specifically prohibit the exportation of glucose. Laws 12831 and 15591 have been cited by error in the questionnaire,

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

because the last mentioned law does not exist and the afore mentioned one refers to a matter [945] completely different from that under consideration, law 12831 declared a National Holiday on 12th August. As I have already stated, the laws cited and which are connected with this matter, do not specifically prohibit the exportation of glucose but do give the Executive Power full authority to restrict and prohibit the export of those products which it is considered necessary to retain in the country. The Executive Power, therefore, was the one to decide which products could be exported and which could not be exported.

By Decree 20262 of the 20th. July, 1944, which was regulated by Decree 23896 of the 3rd. October, 1945, the Secretariat of Industry and Commerce was created, and in article 6 of this last named decree, it is disposed that the complete control of importation and exportation will be handled by the Secretariat of Industry and Commerce. the decrees to which I have referred regarding the creation of the Secretariat of Industry and Commerce, have been ratified by law 12924 of the 13th. January, 1947.

According to what I have already declared, the Executive Power was empowered to regulate the exportation of products, and in this case the Executive Power delegated this authority to the Secretariat

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
of Industry and Commerce, article 14 of law 12591 reformed by decree 16216, referred to this delegation of authority to the Secretariat of Industry and Commerce. [946] In the exercise of this authority, the Secretariat of Industry and Commerce dictated a resolution, No. 5109, in which it established that in order to obtain export permits for glucose, the exporters must prove that they had delivered to the Government 1% of the production of maize, when such production corresponded to harvests up to 1945, inclusive. If the harvests were of a later date, the exporters must prove that they had obtained the maize from I.A.P.I. (Instituto Argentino Promocion Intercambio). I have not obtained a copy of this resolution, No. 5109, and merely cite the pertinent part of same.

On 29th. August, 1946, the Secretariat of Industry and Commerce dictated resolution 6926, which limited to Exhibit 5 4000 tons the exportable quota of glucose during the period 1st. June, 1946 to 30th. June 1946. On 18th. September, 1946, the Secretariat of Industry and Commerce passed resolution 7499, in which it is stated that the Exhibit 6 export of glucose will be submitted to prior permits which will be granted only when home consumption requirements have been taken care of.

According to data which I have, the Secretariat of Industry and Commerce dictated a resolution during the first part of May, 1946, prohibiting the export of glucose. This resolution, according to my

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

information, was in the form of a verbal order given by the Secretary of Industry and [947] Commerce, with the object in view of making a complete study of the market conditions in general, with particular reference to glucose, ordered all the persons working under him to refuse export permits for glucose, and to withhold permits already granted but not handed over to the exporters.

I have mentioned all the laws, decrees and resolutions of which I have knowledge, which deal with this matter. I exhibit copies of resolutions 6926 and 7499 and decree/law 16216 which, when authenticated by a Notary Public, will be attached to this deposition.

To the Fifth Interrogatory, he says:

In my reply to No. 4 I have mentioned all the laws, decrees and regulations, and all other information I have on the subject. I confirm the existence of the verbal order, to which I have referred, and although I do not know the exact text of this order because it was delivered verbally, from data which I have, it stated that no new permits should be granted, and that those granted but not turned over to exporters, should be withheld.

The order prohibiting the export of glucose was completely legal and valid. When I make this affirmation, I found my statement on the laws and decrees which I have mentioned, which delegate complete authority to the Executive Power to restrict the export of any and all products they con-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

sider necessary. I would also draw attention to the period [1948] during which the verbal order was given, May 1946; the Argentine Republic was under the rule of a de facto Government, as a consequence of the resolution of 3rd. June, 1943, when the National Congress was dissolved. All duties of the Government, except Judicial functions, were centralised in the Executive Power, whose existence had been recognised by the Supreme Court of National Justice and by all the countries of the world, so even though in theory the legal validity of some of the measures adopted by the Executive Power could be disputed, the full efficacy of these dispositions cannot be denied. According to our constitutional system, judges may only be removed by death or through a political trial on the accusation of the Chamber of Deputies, and sentence passed by the Senate, nevertheless, during the Revolutionary Government many judges were dismissed from their office by a decree and new judges were appointed, who passed sentence on the cases submitted to them and no one has ever disputed the validity of these decisions. In the same way, the Executive Power dictated dispositions which were not in strict accordance with the law, but which were efficacious and no one has been in disagreement with them. It was quite legal for the Executive Power to deny export permits by means of verbal orders, considering the state of the country, as they were fully authorized to restrict exportation by laws and de-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

crees to which reference [949] has already been made.

To the Seventh Interrogatory, he says:

I do not know of any decisions in this connection.

To the Eighth Interrogatory, he says:

I refer to my answer to No. 7.

To the Ninth Interrogatory, he says:

In my professional opinion, under the laws and regulations in force at that time, the contract referred to in Exhibit 'A' could not have been complied with. If the verbal order of the Secretary of Industry and Commerce which prohibited the export of glucose was posterior to the date of the contract, the contract could not have been complied with either, because this order constituted a case of fortuitious circumstances under the terms of Articles 513 and 514 of the Civil Code. If the order was anterior to the date of the contract this also could not have been complied with because the essence of the contract was the shipment of 1135 tons of glucose, which was prohibited and, therefore, the contract would be null according to article 953 of the Civil Code.

To the Tenth Interrogatory, he says:

The reasons for my foregoing opinion are found in Articles 513 and 514 of the Argentine Civil Code which says:

(Dr. Carranza read from notes)

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)

“The debtor will not be responsible for damages and interests which may originate through lack [950] of compliance with his obligation, when this is due to fortuitious circumstances or force majeure, that is unless the debtor should have accepted responsibility for the consequences of fortuitious circumstances, of that these should have been caused by his fault or conditions already constituted by delay not due to fortuitious circumstances or force majeure.”

Article 514:

“A fortuitious circumstance is one which could not have been foreseen, or if foreseen could not have been prevented.”

Fortuitious circumstances or force majeure (in our law these are synonymous are composed of two elements:

- a. objective—an act of nature such as a storm, flood etc. or human actions, strikes, etc. or an act traditionally known as ‘decision of the Prince’, that is dispositions made by the Government.
- b. subjective—circumstances not due to the fault of the debtor; in the case of which I refer this lack of fault to the debtor is clearly defined, due to the order of the Secretary of Industry and Commerce which prohibited [951] the export of glucose, the contract could not be ful-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

filled. The order emanated from a competent authority and as a result the contract was dissolved.

Our courts register many cases of fortuitious circumstances, I cite among them:

- a. suspension of production of a salt mine by a competent authority.
- b. Prohibition by the Executive Power for concessionaires of the Municipality to continue collecting tax on silt, gravel and sand.
- c. Prohibition by the Executive Power of the occupation of lands understood to be under exclusive national jurisdiction (Jurisprudence of the Civil Courts of the Capital, volume CLI, page 251).
- d. Force majeure is said to exist in the case of the denial of authority by a Government to export merchandise during times of war, because the purchasing firms figure on the contry's list of enemy firms (see *Gaceta del foro* Nov. to Dec. 1919, page 230.)

All the cases cited deal with dispositions taken by the Government which made compliance with contracts impossible. [952]

To the Eleventh Interrogatory, he says:

A law emanates from the Legislative Power, and the Executive Power acts as co-legislator and pro-

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
mulgates the law. A decree is dictated by the Executive Power, but if it is a regulating decree it must not alter the essence of the law (Article 86, 2nd. paragraph of National Constitution.) Regulations are sent out by the Departments, Ministries or Secretariats of State and cover matters concerning them.

My opinion as given is based on my knowledge of the Argentine Constitution and on laws dictated subsequently.

To the Twelfth Interrogatory, he says:

In the case of conflict, a law prevails over a decree and a decree over a regulation of a Ministry, according to Article 31 of the National Constitution. There are many cases in the Courts where a decree has been declared null and void, when such has been passed with the pretext of regulating a law, and actually modified it, see Argentine Jurisprudence 1945, volume 1, page 277, year 1944, volume 2, page 396, etc. Nevertheless with reference to the concrete case under consideration, I want to state that there is no possibility of a conflict between a decree and a law because the laws 12591 and 12830 delegated to the Executive Power full authority to decide which articles could be exported and which prohibited, so that the Executive Power when prohibiting the [953] export of glucose exercised power granted them in a fully legal manner, therefore, there can be no possible conflict.

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

To the Thirteenth Interrogatory, he says:

In my professional opinion, the fact referred to in this question does not alter my conclusions. If the verbal order to which I have referred existed, then the contract had no value, therefore, the telegram of 7th. July, 1946, is of no importance, as it only states the wish not to enter into a contract, but the prior contract was without effect. If, theoretically, it is proved that the verbal order did not exist, the telegram would still be of no importance, because the contract referred to in Exhibit 'A' would be in force, and could not be annulled by the unilateral desire of one of the parties.

To the Fourteenth Interrogatory, he says:

The reasons for my opinion are given in my answer to the foregoing question. [954]

Answers By Eduardo Martinez Carranza
To Cross-Interrogatories

To the First Cross-Interrogatory (to Defendant's Interrogatory No. 5.) he says:

a. I cannot give the name of nor the position occupied by the person who informed me that the Secretary of Industry and Commerce had issued the verbal order to which reference has been made, but I can say that in July of 1947 we received a letter in our office from Bronson, Bronson & McKinnon of

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
San Francisco, California, lawyers for the defendant in this case, in which letter, among other data, they asked us to let them know of all legal dispositions and rules existing in the Argentine Republic regarding the exportation of glucose. With this end in view, and after studying the existing laws, I went to the Import and Export Division of the Secretariat of Industry and Commerce, situated in 25 de Mayo 197 of the city of Buenos Aires, where I asked to see one of the heads of the department. I asked the person I saw to advise me of all regulations and orders dictated in the Secretariat of Industry and Commerce to regulate the export of glucose. This person was the one who informed me of the existence of resolutions 5109, 6926 and 7499, which I have already cited in my declaration, and it was also he who advised me of the existence of the verbal order, which I have already mentioned. I went three or four times after this to the Secretariat of Industry and Commerce, and the existence of this order was [955] always ratified. The data I obtained from the Department of Import and Export coincides with information collected by my partner, Dr. Robiola, in direct contact with the Secretariat of Industry and Commerce.

b. The date was around the middle of July, 1947, the place 25 de Mayo 197. There was no other person present, as the interview was a private one.

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

c. The order was given (according to my informant) the first few days of May 1946, by Mr. Rolando Lagomarsino, who was at that time Secretary of Industry and Commerce, I wish to state that he had been named to this position a short while before the order was made, and he made this deposition so that a proper study could be made of the glucose market. According to information, this order was in force during the period the investigation was made, which fact appears to be confirmed in that on 29th. August, 1946, resolution 6926 was dictated, which was later modified by 7499. The resolutions clearly indicate that a study was being made, conclusions of which were only definite when later resolution was passed.

d. I understand the order was not made public; it was made known only to the exporters who requested export permits, which were not granted.

e. This order was given in compliance with laws and decrees already mentioned, which gave the Secretariat of [956] Industry and Commerce full power to regulate commerce.

f. I understand there is no such record.

To the Second Cross-Interrogatory (to Defendant's Interrogatory No. 6) he says:

a. Yes.

b. Article 17 of the Civil Code which reads (quoted)

“Laws cannot be derogated in their entirety or in part except by other laws. Usage, custom

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)

or practice cannot create rights except when laws refer to them.”

c. I cannot cite the decision of any court on this matter, but I can affirm what I have already stated, that the Secretariat of Industry and Commerce is fully authorized by laws and decrees to regulate the exportation of products; no merchandise can be exported without permission of the Secretariat of Industry and Commerce, so whatever may be the legal aspects of the verbal order, it is a positive and concrete fact that unless permits are granted by the Secretariat of Industry and Commerce, products may not be exported.

d. I refer to my answer to the above question, and reiterate that, without permission of the Secretariat of Industry and Commerce, no exportation can be made, so that if the plaintiff in this case had no permit to export glucose, he could not comply with the contract. [957]

e. Article 5 of decree 659 of 14th. January, 1947, published in the Boletin Oficial 17th. January, 1947, and article 4 of decree 10893 of 24th. April 1947, published in the Boletin Oficial the 29th. 1947, state that the Boletin Oficial should publish the full text of laws promulgated by the Executive Power, and should also publish decrees, resolutions, reports and other data sent to them from the Press Office of the President of the Nation, with the purpose of making the state and movement of National ad-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

ministration known to all, and also the purport of the laws and decrees.

This publication is made under the vigilance of the Director of the Boletin Oficial, but there are many resolutions, decrees and reports which are not published in the Boletin Oficial.

f. According to this, my opinion would vary or would not vary. If permit to export glucose was made after 1st. May, 1946, my opinion would vary because this would mean that even though order had been given to the contrary, permit was granted, but the fact that glucose was exported in the period under review does not change my opinion, because permits once granted and handed over to the exporter, are valid for 180 days, so that permit authorized in November of 1945, would call for glucose to be exported in May, 1946, and a permit granted in December, 1945, would permit exportation of Glucose in June, 1946, and so on. According to [958] information I have, Engraw did not have an export permit prior to 1st. May, 1946, so no export could be made.

g. I refer to the answer given to No. 7. The fact that exportation was made during this period does not prove interpretation of any order, exportation could have been made covering permits granted prior to May, 1946, and valid for 180 days.

h. In my opinion, the order of May, 1946, was the one which prohibited the export of glucose. The order, as I have already stated, is perfectly valid

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
and it would be useless to repeat myself. This order constituted a case of fortuitious circumstances which would make compliance with the contract impossible.

I wish to state that while at the University of Cordoba, among other works, I published a treatise on what is the precise theory of a fortuitious circumstance or force majeure, in which I cite numerous cases of our courts concerning this matter. I attach a copy of this Exhibit 7 work, as an integral part of my declaration. Among the authors cited in my work, who have written regarding the impossibility of fulfilling a contract when confronted with a fortuitious circumstance or force majeure, are the following: Planiol "Elemental Treatment of Civil Law, Volume 2, No. 231, page 90; Bruzin "Essay on the subject of foreseeing", page 24 and those following, Polaco "Obligations in Italian Civil Law", volume 1, page 333, No. 63, [959] Bonnecase "Supplement to theoretical and practical treatment of Civil Law", De Baudry, La Caninerie, No. 272, page 539, Salvat "Obligations in General" page 70, No. 146, Argentine Jurisprudence, volume 13, page 220.

To the Third Cross-Interrogatory (to Defendant's Interrogatory No. 9) he says:

A. In answering No. 9 I have based my opinion on the fact that the verbal order of the Secretary of Industry and Commerce is a fortuitious circumstance or force majeure. In this case and on account

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

of Articles 513 and 514 of the Argentine Civil Code, the contract is dissolved without responsibility of either party. I also refer to the jurisprudence cited in answering 10a.

b. I refer to the previous question.

To The General Corss-Interrogatory (to Defendant's Interrogatory No. 10) he says:

a. Yes.

b. It is published in Buenos Aires every working day.

c. The Boletin Oficial was created by law 438 on 5th. October, 1870. This law was derogated by law 697 of 15th. October, 1874, and definite creation of the Boletin Oficial was made by decree on 2nd. May, 1893. By decree 659 of 14th. January, 1947, already referred to, it was stated that official text of all laws passed by the Executive Power should be published in the Boletin Oficial, as also the [960] text of all other decrees, resolutions, reports and other data sent in by the various official institutions, which concerned the state and movement of National administration and what is ordered by laws and special decrees. By decree 10893 of 24th. April, 1947, also referred to, it is stated that the Director of the Boletin Oficial shall follow the publication in the Boletin Oficial of laws, decrees and acts of the Executive Power which have public character and which are sent in by the Press Office of the President of the Nation,

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

as also all other resolutions, reports and other official documents sent in by this office.

d. I refer to what I have already stated. In the decrees mentioned, reference is made to date of publication in the Boletin Oficial when this was the case.

e. Publication in the Boletin Oficial gives official character to the text of the laws, decrees or resolutions, and it is supposed that they are known by all, nevertheless, as stated already, not all resolutions are published in the Boletin Oficial, for example many resolutions of the Secretariat of Industry and Commerce have not been published in the Boletin Oficial, and the only publicity given them has been the affixing of information on boards in the buildings of the Secretariat, so that those interested would be advised. Article 2 of the Civil Code states that laws should be published but it does not say that they [961] must be published in the Boletin Oficial, there is no law to this effect, publication may be made in any other organ and be completely legal. I cite a case resolved by the Federal Chamber on 21st December, 1925, and attached a copy of same. Exhibit 8. It decided that a law was sufficiently publicised which appeared in an unofficial paper prior to its date of publication in the Boletin Oficial.

f. In my declaration whenever available I have mentioned the dates of publication in the Boletin Oficial of laws and decrees, and in the cases where

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

such dates are not mentioned it is because I could not locate copies of the Boletin Oficial.

/s/ EDUARDO MARTINEZ

CARRANZA

EDUARDO MARTINEZ

CARRANZA, Witness

/s/ ELSA ZABALA

ELSA ZABALA, Interpreter

/s/ FRED H. HAUSER JR.

FRED H. HAUSER JR.

Vice Consul of the United
States of America. [962]

DEFENDANT'S EXHIBIT T-3

In the District Court of the United States for the
Southern District of California
Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A., a corporation
Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation
Defendant

INTERROGATORIES
and
CROSS INTERROGATORIES.

Deposition of Adolfo Carlos Magdalena, taken before me, Fred H. Hauser, Jr. Vice Consul of the United States of America at Buenos Aires, Argentina, at 9:30 a.m. on May 13, 1948, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Adolfo Carlos Magdalena, could not intelligently testify in the English language, and did well understand the Spanish language, one Elsa Zabala, who also well understands said Spanish language, was employed as interpreter and was sworn as follows:

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

“You do solemnly swear that you will truly and [963] faithfully interpret the oath and questions to be administered to Adolfo Carlos Magdalena a witness now to be examined, out of the English language into the Spanish language and that you will truly and faithfully interpret the answers of the said Adolfo Carlos Magdalena thereto out of the Spanish into the English language.”

and said Elsa Zabala interpreted accordingly.

The answers of the witness, Adolfo Carlos Magdalena to said interrogatories and cross-interrogatories were taken down stenographically by Elsa Zabala, of Avenida Quintana 337, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Adolfo Carlos Magdalena, a witness now to be examined. So help you God.”

Adolfo Carlos Magdalena of Lavalle 710, Buenos Aires, Argentina, 37 years of age, lawyer, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says: [964]

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

ANSWERS BY ADOLFO CARLOS
MAGDALENA TO INTERROGATORIES

To the First Interrogatory, he says:

Adolfo Carlos Magdalena, 37 years of age, address Lavalle 710, Buenos Aires, Argentina, occupation lawyer.

To the Second Interrogatory, he says:

I have followed my occupation as a lawyer in the Federal Capital, and in La Plata. I am associated with Dr. Isidoro Pustilnick. We are lawyers for many important companies, among which are T. Froeschle & Co., H. Koch & Co., Cia. Arenera delPlata, J. A. Chilibroste & Co., La Blanqueda, Miguel Esteban Riglos, etc.

To the Third Interrogatory, he says:

I followed first three grades at school known as "Maria Sanchez de Thompson", and then attended Lacordaire, and graduated from there. I then went to the Law School of Buenos Aires and obtained my law degree. I was admitted to the practice of law in 1943. I have not held any official position.

We carry out all legal work in connection with the firms already mentioned, and for various other firms. We advise them as regards contracts, attend their meetings, advise them regarding the formation of other companies, compilation of balance sheets, etc. etc.

To the Fourth Interrogatory, he says: [965]

Various laws have been dictated in the Argentine

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

Republic referring to this matter: law 12591 promulgated 8th. September, 1939 and published in the Boletín Oficial on 11th. September, 1939, enforced from the date of its publication until 3rd. June, 1946. This law was modified by decree 16216 dictated by the Executive Power 3rd. June, 1946. Later on there was law 12830 promulgated 23rd. August, 1946, and published in the Boletín Oficial 16th. September of the same year. This was modified by law 12983, which will be in force until 3rd. June, 1952. Law 12983 was sanctioned 30th. April, 1947, and promulgated 3rd. May, 1947, and was published the same day in the Boletín Oficial. It is a law dealing with the cost of living, it applies penalties to those who infringe the law by charging prices which are considered too high, and gives the Executive Power full authority to apply these penalties. Law 12831 has no connection with the case under review, as it declared a National Holiday on 12th. August, to celebrate the Reconquest. Law 15591 does not exist and must have been quoted in error. None of the laws specifically forbid the exportation of glucose, but they authorise the Executive Power to limit, restrict, prohibit or authorise the exportation of products which might be considered necessary for the country. From this it is deduced [966] that the determining of which products are exportable is left to the authorities directly concerned, that is the Executive Power delegates authority to the pertinent departments

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

to handle his matter. Many resolutions and dispositions have been dictated covering this subject by these departments, stating which articles could be exported, which could not, and the formalities to be observed by the exporters in all cases. These dispositions have been numerous and many of course are not concerned with glucose. In connection with the exportation of glucose, the Executive Power dictated through the Secretariat of Industry and Commerce, the following resolutions which I think are the only ones directly concerned with this product: 5109, 6926 and 7499, copies of 6926 and 7499 are attached by Dr. Robiola to his deposition. 5109 states that in order to obtain export permits for glucose, the exporters must previously prove that they have turned in to the Government 1% of the maize harvest prior to and including 1945, and if after this date must show that the maize to be exported has been obtained from I.A.P.I. (Instituto Argentino Promocion Intercambio). There was also a verbal order given by Dr. Rolando Lagomarsino, Secretary of Industry and Commerce, during the first days of May 1946, prohibiting the export of glucose for a period of time [967] during which a study would be made of the market in general, and of glucose in particular. At the same time he requested retention by the Secretariat of Industry and Commerce of export permits already granted but not yet handed over to the exporters.

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

To the Fifth Interrogatory, he says:

I have cited all the laws and resolutions I know of regarding this matter, and do not think there are any others. The terms of the verbal order to which I have referred were to prohibit the exportation of glucose, that is, grant no new export permits, and to withhold those already granted but not handed to the exporters.

To the Sixth Interrogatory, he says:

The Executive Power, as already stated, is authorised to regulate the laws mentioned, being able to include or exclude products the export of which they deem necessary to limit, restrict or prohibit. Within our legal system these regulations must be covered by decrees and this has usually been done, but in order to establish the validity of the resolutions adopted by the Secretariat of Industry and Commerce it should be borne in mind that article 14 of law 12591, modified by decree 16216, was fully descriptive, that is, the Secretariat of Industry and Commerce was authorised to determine what articles should be exported, and the means by which control should be [968] maintained. The verbal order, to which I have referred, was made in May 1946, during which time the country was under a *de facto* Government, that is in the hands of a group of military men who had brought about the revolution, so that whatever might be the validity of this verbal order during normal times, I consider it was completely legal from every aspect during the

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

period it was given due to the abnormal conditions under which the country was existing. The Congress was dissolved by this de factor Government, which by Act of Congress, was the entity which sanctioned laws. In the absence of this legal body the Executive Power was vested with legal authority and dictated many decrees which were considered laws and carried out accordingly. According to the Constitution a law may only be modified by another law never by a decree, nevertheless in the period mentioned, 4th. June 1943 to 4th. June 1946, the Executive Power dictated decrees which modified laws, and even exonerated judges by the passing of a simple decree. According to our legal system judges may only be removed by death or by a trial before the Chamber of Deputies with a sentence passed by the Senate. New judges were appointed by the Executive Power, and these judges passed sentences which have not been disputed, even though the judges were not appointed in a strictly legal manner. I mention this to accentuate the abnormality of the times, [969] and from what I have said it may be deduced in a categorical manner that whatever may be the legal aspects of the resolutions passed by the Executive Power, theoretically they may be disputed, but practically they were in full effect.

To the Seventh Interrogatory, he says:

I have no knowledge of any such interpretations.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

To the Eighth Interrogatory, he says:

I refer to No. 7.

To the Ninth Interrogatory, he says:

As regards this question, I consider that the contract could not have been complied with because, as already stated, there was a prohibition existing covering the export of glucose, and as the object of the contract consisted of the obtaining and delivery of a quantity of this merchandise, the verbal order preventing export of glucose would necessarily make compliance with the contract quite impossible. This constituted a case of force majeure and the contract would automatically be dissolved without responsibility to either party, according to Article 513 of the Civil Code, and also Article 514.

To the Tenth Interrogatory, he says:

I found my opinion on Articles 513 and 514 of the Argentine Civil Code, which determine what constitutes a case of force majeure, or fortuitious circumstance. [970] These articles have been fully quoted by Drs. Robiola and Carranza in their depositions. There have been many court cases on this matter, and these also have been fully referred to by Drs. Robiola and Carranza.

To the Eleventh Interrogatory, he says:

In the form in which laws are sanctioned it is stated in our Constitution that a law must be sanctioned by the Legislative Power, and the Executive

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

Power in its character of co-legislator can veto, modify or promulgate it. If vetoed, the law returns to the Chamber of origin, and in the case of the existence of both Chambers, if it passes by $\frac{2}{3}$ votes, it goes again to the Executive Power, who are then obliged to promulgate it. If they do not, within a certain period the law automatically goes into effect. Once a law has been published it is presumed known by all the inhabitants of the Republic, who must submit themselves to the dispositions of the law.

A decree is an act which emanates only from the Executive Power and must, within the dispositions of our Constitutional regime, be subject to the rules of the Constitutional regime, be subject to the rules of the Constitution. A decree cannot modify a law, see part 2. of Article 86 of the National Constitution.

Regulations, resolutions and orders emanate from the various Ministries, Secretariats, and Departments to which [971] the Executive Power has delegated many of its functions. No special publicity is required in order that they be considered valid, although it is usual that the departments concerned give them certain publicity, but at times this is done in a very restricted manner.

In the case of a conflict between a law and a decree, the law prevails over the decree.

My opinion is based on my experience in the exercise of my profession.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

To the Thirteenth Interrogatory, he says:

My opinion would not be changed, as it is founded on my knowledge of Articles 513 and 514 of the Civil Code which cover fortuitous circumstances of force majeure. The contract was dissolved because of the fortuitous circumstance which existed through the giving of the verbal order by Mr. Lagomarsino. In the supposition that this verbal order was non-existent then the contract would have full value and the telegram of 7th. June, would have no value because the contract could not be dissolved by the unilateral desire of one of the parties.

To the Fourteenth Interrogatory, he says:

I do not know of any court decisions on this matter and refer to my answer to the previous question, and legal dispositions which I have cited. [972]

/s/ A. C. MAGDALENA,

Adolfo Carlos Magdalena,

Witness.

/s/ ELSA ZABALA,

Elsa Zabala,

Interpreter.

/s/ FRED H. HAUSER, JR.,

Fred H. Hauser, Jr.,

Vice Consul of the United
States of America.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

ANSWERS MADE BY ADOLFO CARLOS
MAGADALENA TO CROSS-INTERROGA-
TORIES

To the First Cross-Interrogatory (to Defendant's Interrogatory No. 5), he says:

a. On my return from a trip to Europe last year, about the middle of October, I had an interview with Dr. Robiola who asked me very specially to go to the Secretariat of Industry and Commerce to ratify information he had been given, that there was in effect a verbal order prohibiting the export of glucose. I went there at the end of October (25 de Mayo 197) and called on a colleague, who is also a personal friend of mine, and he advised me that Mr. Rolando Lagomarsino in May, 1946, had given this verbal order, prohibiting all permits for glucose and requesting that all permits granted but not handed over be retained by the Secretariat of Industry and Commerce. I do not give the name of this gentleman as he requested my discretion in this respect. There were no other persons present.

b. Date and place have already been given.

C. The order was given at the beginning of May, and was to be in force while the internal situation of maize was being studied. Small exports were made during this period but this was because permits once granted and turned over to the exporters, were good for 180 days, so that permits delivered prior to May 1946 were good until the end [974] of September 1946.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

d. This verbal order was given the necessary publicity within the departments concerned, and all employes connected complied with same. It was not published in any newspapers.

e. Law 12591 modified by decree 16216 delegated to the Secretariat of Industry and Commerce full power to control export and import matters. Mr. Lagomarsino when he gave the verbal order prohibiting export of glucose, had complete authority to do so, and the fact of its complete efficacy is evident, in that everyone concerned complied with same.

f. I do not think there is any record, as the order was verbal and was not published in any newspaper.

To the Second Cross-Interrogatory (to Defendant's Interrogatory No. 6), he says:

a. Yes.

b. Article 17 of the Argentine Civil Code reads: "Laws cannot be derogated in their entirety or in part except by other laws. Usage, custom or practice cannot create rights except when laws refer to them."

c. I refer to what I have already stated, in accordance with authority conferred by decree 16216, the Secretary of Industry and Commerce had complete power to limit, prohibit or authorise exportation of products or merchandise. Whatever might be considered legal aspects of decisions taken by the Secretariat of Industry and Commerce, reality is that if export permits are not granted by them,

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

then merchandise does not leave the country, and this condition is still prevalent, and was even more strictly enforced during the period under consideration, May 1946. Any disposition passed by the Secretariat of Industry and Commerce, however arbitrary it might be, had full effect in the Republic, because due to the abnormal conditions under which the country was living after power had been usurped in the revolution of 4th. June, 1943, the de facto Government had taken over all the executive and legislative power, and delegated authority to the various Ministries, Secretaries, etc., to carry out whatever measures they considered necessary, so that any resolutions of any kind passed by the Secretariat of Industry are considered completely valid and legal from every point of view.

d. I refer to what I have already declared.

e. Orders, regulations, etc., in order to be valid do not have to be published, at times this information is posted on the walls of the various departments concerned for the advice of those interested. I do not know of any legal disposition which requires their publication in any special manner.

f. Yes, this would affect my opinion fundamentally, because if new permits had been granted it would prove the inefficacy of the verbal order to which I have referred, [976] however, according to my information no new permits were authorized by the Secretariat of Industry and Commerce during the period under consideration. As I have already

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

stated, small quantities of glucose were exported during this time but they were covered by permits granted and handed over prior to 1st. May, 1946 which were good for 180 days.

g. I have already referred to this in my answers.

h. The exportation of glucose was prohibited by a verbal order emanating from Mr. Rolando Lagomarsino, who, as Secretary of Industry and Commerce, was fully authorized to make this order, as per law 12591 modified by decree 16216, which delegated power originating from the Executive Power. This verbal order could or could not be considered completely legal, but it was put into practice and carried full force as no new export permits for glucose were granted after 1st May, 1946.

Basis for my opinion has already been stated.

To the Third Cross-Interrogatory (to Defendant's Interrogatory No. 9), he says:

a. I have already stated that a verbal order existed which prohibited the export of glucose and, therefore, a case of fortuitious circumstance existed, as covered by Articles 513 and 514 of the Civil Code, so that automatically the contract would be dissolved without [977] responsibility of either party. I also refer to jurisprudence referred to in answering 10a.

In order that a case of fortuitious circumstance or force majeure may be considered to exist, it must be proved that there is an unseen obstacle which would make it impossible for the contract to

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

be complied with. Foreign and national authors of works on this subject have stated that impossibility of complying with a contract when confronted with unsurmountable obstacles constitutes a fortuitious circumstance or force majeure.

b. Various authors who have written on this subject have been cited by Drs. Robiola and Caranza.

To the General Cross-Interrogatory (to Defendant's Interrogatory No. 10), he says:

a. Yes.

b. In Buenos Aires every working day.

c. The Boletin Oficial was created by law 438 in 1870, which law was derogated in 1874, and definite creation was effected by decree of the Executive Power 2nd. May 1893, when it was stated that Boletin Oficial would publish laws, decrees, resolutions, reports, and other data, which showed the state and movement of the Administration. In January 1947 a decree was distated, which was published in the Boletin Oficial on 17th. January, 1947, wherein it was stated that the official text of laws promulgated by the [978] Executive Power, decrees, resolutions, reports and other data received from official institutions, should be published in the Boletin Oficial, in order to make known the state and movement of national administration. By a later decree of 24th. April, 1947, 10893, it was established that the director of the Boletin Oficial would be responsible for the publication in this organ of

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

laws, decrees and acts of the Executive Power which have public character or are sent in by the Press Office of the President of the Nation.

d. I refer to my previous reply.

e. It is presumed after laws, resolutions, and decrees are published in the Boletín Oficial that they are known by all. According to professional opinions I have obtained it is not essential for their validity that resolutions be published in the Boletín Oficial, and this is the case of many such measures passed by the various Ministries, Secretariats and Departments who, as already stated, affix the information to the walls of respective institutions. There is no law calling for publication in the Boletín Oficial, only decrees to this effect, publication in any other organ is sufficient, this was stated by the Federal Court of the Capital in a sentence passed by them. It was stated that publicity given over the radio was sufficient to make a resolution known to the public. This decision was published in "Justicia del Trabajo." [979]

f. This information has been given where available.

Dr. Magdalena consulted his notes when replying to questionnaire.

/s/ A. C. MAGDALENA,
Adolfo Carlos Magdalena,
Witness.

/s/ ELSA ZABALA,
Elsa Zabala,
Interpreter.

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

/s/ FRED H. HAUSER, JR.,

Fred H. Hauser, Jr.,

Vice Consul of the United
States of America.

Republic of Argentina,

City of Buenos Aires,

Embassy of the United States of America—ss.

I, Fred H. Hauser, Jr., Vice Consul of the United States of America, in and for the consular district of Buenos Aires, Argentina, the commissioner named in the annexed commission, do hereby certify that in pursuance of said commission, I examined Dr. Mario Robiola, Dr. Eduardo Martinez Caranza, and Dr. Adolfo Magdalena at my office in Buenos Aires, Argentina, on the 10th, 11th, and 13th days of May, 1948, and that the said witnesses being to me personally known and known to me to be the same persons named and described in the interrogatories and commission annexed, being by me personally sworn to testify the truth, the whole truth, and nothing but the truth in answer to the interrogatories and cross-interrogatories in the cause in which the annexed commission is issued, their evidence was taken down by me, and after being taken down by me, and after being read over and corrected by them respectively, was subscribed by them respectively in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested

Defendant's Exhibit T-3—(Continued)

in the result thereof.

In witness whereof, I have hereunto set my hand and [981] seal of office at Buenos Aires, Argentina, this twenty-fourth of May, 1948.

/s/ FRED H. HAUSER, JR.,

Fred H. Hauser,

Vice Consul of the United States of America, Acting as Commissioner. [982]

Service No. 4632a.

Fee No. 32, \$10.00 Equal to \$41.00 Arg. Paper.

Service No. 7633a.

Fee No. 32, \$69.00 Equal to \$282.90 Arg. Paper.

(Stamps and Stamp Dates.)

[Seal] [983]

DEFENDANT'S EXHIBIT U

Purchase Order

Schenley Distillers Corporation

800 Tennessee Street

San Francisco 7, Calif.

To (Vendor)

Ship Prepaid to

Date Pur. Req. No.

Page No. of A.A. No.

F.O.B.

Routing

Terms

Shipping Date Specified

Quantity Unit Stock No. Description Unit Price

Defendant's Exhibit U—(Continued)

Important—The terms and conditions embodied on the front and reverse sides of this order shall constitute the sole and entire contract of purchase of the articles described herein and shall not be binding upon the buyer unless signed by our director of purchases or such authorized person as has been designated in writing by our director of purchases to the vendor.

Sign and Return Copy No. 2 Attached hereto

To Schenley Distillers Corporation

800 Tennessee Street

San Francisco 7, Calif.

as your acknowledgment and acceptance of this order.

Your Regular Form of Letter of Acknowledgment, while appreciated, does not constitute an acceptance of this order.

SCHENLEY DISTILLERS
CORPORATION.

(Buyer.)

.....

Signature.

.....

Title.

Instruction for
Shipping and Billing

1. All shipments must be accompanied by packing slips or loading tickets marked "Partial or Complete."

2. Duplicate copy of Bill of Lading must be mailed to Consignee.

Defendant's Exhibit U—(Continued)

3. Invoices marked "Partial or Complete" must be rendered in Triplicate together with original copy of bill of lading to Disbursement Audit, 850 Battery Street, San Francisco 11, Calif., within 24 hours.

4. At the end of each month, Fully Itemized statements of account, showing all debits and credits, must be rendered to Disbursement Audit, 850 Battery Street, San Francisco 11, Calif.

5. Our Purchase Order Number and Department must appear on all invoices, packages and shipping papers.

(Reverse Side of Exhibit U)

Terms and Conditions

1. This order shall not be binding upon the company, unless signed by our Director of Purchases, or such authorized persons as have been designated in writing to you by our Director of Purchases, and for the vendor in the respective spaces provided. The terms and conditions embodied on the front and reverse sides of this order shall constitute the sole and entire contract of purchase of the articles described herein. By accepting this order the vendor warrants and agrees that this is the only agreement with respect to the purchase and sale of the merchandise specified herein and that there is no outstanding oral agreement between the parties relating to the sale of merchandise. No agreement or understanding modifying, waiving or making any exception in respect of any

Defendant's Exhibit U—(Continued)

of the terms and conditions of this order, or increasing the price or quantity stated on the face of this order, shall be binding on us unless made in writing, and signed in the same manner as this original order.

2. If price is omitted from this order, it is agreed that your price will be the lowest prevailing market price.

3. No overruns of any kind or nature will be allowed unless specified on the face of this order. No overtime charges will be honored unless prior written authorization, signed in the same manner as this order, is given.

4. All terms and conditions hereof must be complied with fully. Merchandise tendered for delivery must conform in every respect with the specifications, blueprints, approved samples or other requirements of this order, and must be of good workmanship and quality. Delivery must be made at such time and in such quantity as specified herein. In the event of any breach of the foregoing provision, and, in addition to all other remedies granted us by law, we shall have the right to refuse to accept delivery and to require you upon written demand to reimburse us for all our loss, damage or expense resulting therefrom, and we may consider this order cancelled, without being required to give you written notice of cancellation.

5. All merchandise is subject to our inspection and acceptance. In addition to all other rights granted us by law, we may return defective goods,

Defendant's Exhibit U—(Continued)

at your expense, for full credit or, at our option, for replacement at the price stipulated herein. Acceptance of defective goods shall not preclude us from rejecting other goods delivered under this order because of the same or different defects.

6. By acceptance of this order, you agree that any affiliated corporation or corporations of Schenley Distillers Corporation, to which the goods covered by this order (or any part thereof) are delivered or transferred shall have the benefit of all rights and privileges under this order, including, without limiting the generality of the foregoing, the benefit of all warranties either express or implied.

7. By acceptance of this purchase order, the vendor expressly warrants that all materials to be furnished hereunder, will be delivered in conformity to and in compliance with all applicable orders and regulations of the War Production Board, and will be invoiced at prices which conform to and comply with regulation, or any amendment thereof, of the Office of Price Administration, as expressed and set forth in any price schedule, Maximum Price Regulation, or the General Maximum Price Regulation, whichever shall be applicable.

8. All merchandise shall be at your risk until safely delivered and received by us on our premises or the premises of the consignee at the point of destination. All transportation charges to the destination shown on this purchase order must be prepaid by you. Where purchases are made f.o.b.

Defendant's Exhibit U—(Continued)

your plant, you shall add such prepaid transportation charges to the amount of the invoice. Paid transportation bills must be attached to your invoice.

9. You agree that patterns, tools, and dies or any equipment purchased for the manufacture of any merchandise for us, will be purchased by you at your expense.

10. It is understood that any articles made according to our design or first made for us will not be furnished by you to any other person, firm or corporation except with our written consent.

11. All packing and cartage charges shall be assumed and paid by you and will not be allowed by us. If your deliveries are so far behind the schedules specified in this order as to make it necessary for us to request you to make shipments by express, it is understood that you will allow the difference between the freight and express charges.

12. Weights, measures and counts taken by our representatives are to be controlling in all adjustments between us.

13. You agree to indemnify and hold us harmless against any loss or damage by fire or otherwise (whether caused by any negligence or otherwise) to any of the merchandise covered by this order, while the same is in your possession, or the possession of your agents or sub-contractors, or any other concern with which you have stored or

Defendant's Exhibit U—(Continued)

by which you have permitted such merchandise to be kept.

14. You agree to hold Schenley harmless from, and to indemnify Schenley against, all loss, liability, damage and expense (including, in the case of litigation, reasonable attorneys' fees and disbursements) arising from or suffered or incurred in connection with (a) any claim of injury to person or property caused in whole or in part by any act done by you, your agents or employees while executing this order or making delivery hereunder, or (b) any claim, with respect to any of the merchandise called for by this order, or arising out of the use of such merchandise, of infringement of any patent, copyright, trademark, trade name, brand or slogan, unfair competition, or other adverse statutory or non-statutory rights, or (c) any litigations based on any claim referred to above. We agree to give you reasonable notice of the commencement or threatened commencement of any such litigation. As used herein, "Schenley" includes Schenley Distillers Corporation and its subsidiary and affiliated companies. This paragraph No. 14 shall have no application to any claim based upon the use of any trademark, trade name, brand or slogan by Schenley, upon any of its products.

15. In the performance of your obligations hereunder, you, your agents, servants and employees shall observe all provisions of Federal, State and local labor and safety laws and regulations, as well as our working and safety rules, a copy of which

Defendant's Exhibit U—(Continued)
will be furnished to you.

16. If this order involves the use of either letterpress work, lithograph (or offset work), intaglio gravure work or photography, it is agreed: (a) All art work, original plates, negatives and positives utilized in letterpress work; all art work, all photographic prints, negatives and positives utilized in intaglio gravure work; and all photographic negatives and positives and plates utilized in photography—any or all of which may be used in the production of this order, are our sole and exclusive property and shall be delivered to us upon demand therefor. (b) Without cost or expense to us, you will store and preserve in condition suitable for reuse, for a period of fifteen (15) months from the date of this order, all of the materials enumerated in subdivision (a) hereof, and in addition the stones and/or plates utilized in lithography or offset work. You agree to furnish transfer impressions to us from said stones or plates when requested by us, at the cost of not over \$10 for each color. If, at the end of said fifteen (15) months, any of the materials enumerated in subdivision (a) hereof or in this subdivision is not available for reuse, for any reason whatever, you agree to replace the same at your own cost and expense. Such of said materials delivery of which is not requested by us within said fifteen (15) month period shall become your exclusive property. We shall have the right to furnish the materials enumerated in subdivision (a) hereof at our option and all provisions hereof

Defendant's Exhibit U—(Continued)

shall apply to such materials.

17. If this order provides for the manufacture, pursuant to our specifications, of any printed, lithographed, engraved or similar materials the purchase order number and code number followed by your initials must appear on the job and three samples must be sent to the Director of Purchases as soon as job is completed, unless otherwise specified herein and samples and/or press proofs must be submitted to us for approval before commencement of work, unless such submission is expressly waived in writing by our Director of Purchases or such authorized persons as have been designated in writing to you by our Director of Purchases.

18. You agree to store the merchandise called for by this order, at your own risk, free of any liability or expense to us for the period during which shipments are to be made. If no period for such shipment is stated on the face of this order, then you agree to store the merchandise for a period of four (4) months from the date hereof. We shall not be under any liability to anyone for the cost of storage of any merchandise remaining undelivered at the expiration of said period unless you send us by registered mail a written notice addressed to our Director of Purchases stating that charges for said storage will be made unless delivery instructions are given, and itemizing the quantity of undelivered merchandise, the place at which it is and is to be stored, and the amount to be charged for storage. Unless we give you delivery instruc-

Defendant's Exhibit U—(Continued)

tions within ten days after receipt of such notice, the maximum amount of our liability for the cost of storage of the merchandise remaining undelivered shall be the amount, if any, actually paid by you for said storage, but not to exceed the lowest prevailing rate for such storage. We shall pay said storage charges monthly upon receipt of a written invoice therefor and, if you do not store the merchandise yourself, evidence satisfactory to us of the actual payment made by you for such storage. Our liability to pay for storage shall cease when we give instructions for the delivery of the merchandise.

19. If all prior deliveries were made at such times and in such quantities as are specified herein, and nonetheless a balance remains undelivered at our request or in the absence of specific delivery instructions herein, we agree to pay for the undelivered balance within five (5) days after you give us (a) evidence satisfactory to us that all the materials and labor entering into the manufacture and final assembly of said merchandise have been paid by you and the merchandise is in your possession, set apart from your regular inventory, or otherwise stored and marked "Property of Schenley Distillers Corporation," or with such other names as we direct in writing and (b) certificates showing that said merchandise is adequately covered by insurance against fire and theft, which certificates shall contain the provision that no material change in or cancellation of the insurance

Defendant's Exhibit U—(Continued)

contracts shall be effective unless ten (10) days prior written notice is received by us at 800 Tennessee Street, San Francisco 7, Calif.

REPORTERS' TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Wednesday, June 9, 1948

(Case called by the clerk.)

The Court: All right, gentlemen, proceed.

Mr. L. B. Stanton: I will call Mr. Juan Lang.

JUAN K. LANG

called as a witness by plaintiff in rebuttal, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Juan K. Lang.

Direct Examination

By Mr. Louis B. Stanton:

Q. Your name is Juan Lang? A. Yes.

Q. Where do you reside, Mr. Lang?

A. Buenos Aires.

Q. Buenos Aires, Argentina?

A. Argentina.

Q. How long have you lived there?

A. For about 10 years.

Q. And have you a business there?

A. Yes.

Q. What business is that?

A. I am a partner of Eugenio Lang SRL.

Q. That means? [996]

(Testimony of Juan K. Lang.)

A. A company of limited responsibility.

The Reporter: I did not get that.

The Witness: A company of limited responsibility.

Mr. L. B. Stanton: A company of limited responsibility. You, among other things, have been engaged in exporting glucose from the Argentine Republic? A. Yes.

Mr. L. B. Stanton: I have shown these documents to counsel, your Honor. They are in Spanish and I have made a translation for the court.

Q. I show you this document, Mr. Lang, to which is attached a yellow paper. Do you recognize that document? A. Yes.

Q. What is that document?

A. That document is a copy of an export license, an Argentine export license applied for by our firm for the export of glucose.

Mr. Bronson: Mr. Stanton, can I ask you to have Mr. Lang speak up a little louder?

The Witness: Sure. Excuse me.

Mr. Bronson: It is hard to hear down here, please.

Q. (By Mr. L. B. Stanton): I note it says at the head "Copia 3," which means there are three copies made and this is the third copy?

A. I suppose it is. I don't know. [997]

Q. Right at the top? A. Yes.

Q. Then it is dated "Buenos Aires, the 28th of May, 1946"? A. Yes.

Mr. Bronson: I am going to object to this method

(Testimony of Juan K. Lang.)

of examination. Let him offer it and then question the witness.

Mr. L. B. Stanton: That was a preliminary question.

Mr. Bronson: I might have objection to it, your Honor.

The Court: Yes. Go ahead.

Q. (By Mr. L. B. Stanton): Do you note the date upon the license, "28th of May, 1946"? By whom was that affixed, that note?

Mr. Bronson: We will object to this. Let the document be offered and then the objection can be made.

The Court: I think he may be trying to establish the character before he offers it, and there is no objection to the question. Go ahead.

A. This date is affixed, the stamp is affixed by the director. I mean it is called "Direccion de Exportacion de Importacion." How should I say—the office of export.

Q. And you will notice in the other corner under the word "control" there are some initials apparently? A. Yes. [998]

Q. By whom was that placed?

A. By some officials of the Direccion de Exportacion de Importacion. I don't know by whom.

Q. There is another writing under that date.

A. Yes. That is a signature. I don't know by whom.

Q. Where did you receive it? Did you ever obtain this permit of exportation, this document I

(Testimony of Juan K. Lang.)

am showing you? A. Yes.

Mr. Bronson: I do not hear the question. I am sorry.

Q. (By Mr. L. B. Stanton): Where did you obtain this document which I am showing you?

A. This document was given to us against payment of the corresponding fee.

Q. By whom?

A. By the Direccion de Exportacion.

Q. There is attached to this document a yellow sheet. Did you obtain that yellow sheet?

A. Yes.

Q. And from whom was it received?

A. This was received by the Banco Central de la Republica Argentina. It is a central bank of the Argentine Republic, where the fee has to be paid.

Q. It was delivered to you by that bank?

A. Yes.

Q. And it indicates some amount that had been paid. [999] Is that the amount that you paid?

A. One-half of one per cent of the full value of the merchandise.

Mr. L. B. Stanton: We offer these documents into evidence, your Honor—this document into evidence.

The Court: All right.

Mr. Bronson: We will object to it at this time, if your Honor please, on the grounds that this is not rebuttal and it has all been gone into on the deposition of this witness taken in Argentina; on the further grounds that he denied the possession of

(Testimony of Juan K. Lang.)

this document in the answers to cross-interrogatories that were propounded by defendant in that deposition. That deposition is in the record now.

The Court: Well, I had hoped to read the depositions before now but I have not had the opportunity to do so. I intend to do that in the next two or three days, because my calendar is now clear.

Mr. L. B. Stanton: I believe that counsel is in error in his statements there. The matter of the issuance of the permit was not gone into upon the interrogatories at any time, and there were no interrogatories addressed to the date of the issuance of a permit. This is directly rebuttal because it was brought out on the depositions of counsel's witnesses from the Argentine that no permits were issued subsequent to May 1, 1946; and they stated that their [1000] views as to the laws would be contrary, if it was so established that any permits were issued subsequent to May 1, 1946.

The Court: This is dated June 11, 1946?

Mr. L. B. Stanton: Yes.

The Court: Well, I will tell you gentlemen what I will do. I am going to overrule the objection and I will reserve you a motion to strike before the case is concluded, because it is understood that we have to keep the case open for the answers to Letters Rogatory and the matter will be argued. So, before we close, you may make a motion to strike this. By that time I will have read the depositions and, in the light of all of the testimony I will be in a better position to determine whether it bears upon the issues.

(Testimony of Juan K. Lang.)

I do believe that where it is insisted that export licenses could not, as a general rule, be obtained, that it is permissible to show that such licenses actually were issued as of that date. So, regardless of any understanding, either oral or interpretive understanding of written regulations, if as a fact permits were or were not granted, that is material.

This is exactly the reverse of the situation which arose in the examination of another witness where, in answer to an argument of Mr. Stanton's, I suggested that regardless of legality or illegality, that if as a fact such licenses [1001] could not be obtained, that the fact was material. So this is the other side, another facet of the same problem.

Assuming that there is testimony in the record to the effect that there was an oral order issued not to grant such licenses, the point is material to show that regardless of any such oral understanding such permits actually were issued. It goes to the weight of the testimony and it would bear upon the credibility of the witnesses who gave their understanding of the oral orders, as it were. It would lend itself to the argument that they should be examined about the date when the order went into effect. It may have gone into effect later on.

Mr. Bronson: I apprehend your Honor's ruling.

The Court: The objection is overruled.

Mr. Bronson: Does your Honor make a suggestion that I make a motion to strike now or later?

The Court: No; later. I am reserving it to you

(Testimony of Juan K. Lang.)

because at the present time I have not any more light.

Mr. Bronson: I understand that. It is just a question of the timing of it, that is all. Sometimes you forget them.

The Court: I think you misunderstood me. I said I will admit it and reserve a motion to strike, to be made before the case is concluded.

Mr. Bronson: All right.

The Court: Because it is understood we will have to [1002] keep the case open until those additional matters are received from the Argentine. The objection is overruled; it may be received and marked Plaintiff's Exhibit. Is there one of these translations here?

Mr. L. B. Stanton: One is a translation, your Honor.

The Court: Have you more than one?

Mr. L. B. Stanton: I have two others. The other two are exactly the same as that exhibit except with regard to certain matters stated on the third page.

The Court: Do you want them all as separate exhibits?

Mr. L. B. Stanton: Well, they might be numbered the next exhibit in order, A, B, C if your Honor chooses.

The Court: The objection will be overruled. They may be received.

Mr. Bronson: Subject to the same understanding with respect to the remaining two, they need not

(Testimony of Juan K. Lang.)

be identified. That formality may be done away with.

Mr. L. B. Stanton: You stipulate that the testimony of Mr. Lang in respect to the one already introduced will be the same with regard to these other two?

Mr. Bronson: Yes; that will be all right.

The Court: With that, they may be received and marked, subject to the same motion to strike, and, as a part of the same exhibit we will attach the translation. I have compared them. It is an accurate translation, I think. [1003]

Mr. Bronson: What are the exhibit numbers?

The Clerk: Shall I number these as separate exhibit numbers, your Honor, A, B, and C?

The Court: Mark them A, B, and C because they relate to the same matter, and then put the translation with them.

The Clerk: The translations are attached to Plaintiff's Exhibit 71 in evidence. Plaintiff's Exhibit 71-A in evidence; Plaintiff's 71-B in evidence.

(Plaintiff's Exhibits 71-A and 71-B appear to be duplicate forms differing in amounts—not copied.)

(Translation of Plaintiff's Exhibit 71, 71-A and 71-B:)

(Testimony of Juan K. Lang.)

PLAINTIFF'S EXHIBIT 71, 71-A AND 71-B

Copy 3 Is for Interested Party

Permit No.....

National seal

Argentine Republic

Secretary of Industry and Commerce

General Director of Commerce

Director of Exportation and Importation

Application No. 189.051-46

Permit for Exportation

Original is sealed for \$.

Name or firm style—Eugenio Lang S/R/L

Domicile: Street-Ave. R.S. Pena 615.

City-Capital Prov. or Territ.

No. of description—JJ-56.

Telephone: 34-2422.

The Direction of Exportation and Importation certifies that by resolution S.I.C..... given on this date at above indicated firm has been authorized to export through [1004] the port of the capital and with destination the United States of America the merchandise which is subsequently given in detail:

Quality in Kgs. Net 50.000.

Detail, Characteristics and Container National Money Fifty thousand kilograms of glucose of maize, liquid, 43/45 Baume; in new wooden casks.

Value F.O.B. 56.907.

(Testimony of Juan K. Lang.)

Copy Not Valid

94345

50.000

56.907

Total Net Weight—Fifty thousand kilograms.

Total Value F.O.B.—Fifty-six Thousand Nine Hundred Seven pesos lawful national money.

This authorization expires the 24th day of November, 1946.

Control.

ND. FHP.

Buenos Aires—28 May, 1946

Indistinguishable Signature

Page two:

Quadruplicate—For the Depositor.

Central Bank of the Argentine Republic

Official Current Accounts

Credit Note for the account of:

The Secretary of Industry and Commerce [1005]

Collectors Office No. Cta. 2531

(Decree No. 141.132-43) E.L.

Application No. 189.052/46

Payment corresponding to: Permit No.....

Name or firm style—Eugenio Lang S.R.L.

Domicile—Ave. R. S. Pena 615 Buenos Aires

Exporters Register No. JJ 56

Effective —

Check No. 483468, City Bank..... 284.54

Check No.

Total National Money..... 284.54

(Testimony of Juan K. Lang.)

Received National Money—Two Hundred Eighty-four and 54/100 Pesos Which corresponds to 5% of the value F.O.B. of the merchandise authorized to be exported by said license.

Buenos Aires 11th of June, 1946.

Signature of Depositor, Eugenio Lang Soc. de Resp. Ltd.

Write clearly.

The above receipt is stamped as follows:

Approval No. 2058

Page No. 293

Entered N.P.

Seal Central Bank

June 11, 1946

There are two other export permits which are the same as the above except as follows:

License No. 189052-46 is for 150,000 kilograms of the value of 152.200 pesos.

Destination—Switzerland. [1006]

The receipt attached thereto is for 761 pesos.

The third is for 25000 kilograms glucose, packed in 650 wooden chests.

Value 17.150.

Receipt attached thereto is for 85.75 pesos.

Otherwise the other two are stamped with the same No. 04345, dated same date, 28 of May, 1948.

The receipts are the same, 11th of June, 1946.

(Testimony of Juan K. Lang.)

Q. (By Mr. L. B. Stanton): Now, Mr. Lang, these three documents which you have just been shown, Exhibits 71, 71-A and 71-B, all bear the stamped date of May 28, 1946. From that or from your other knowledge could you tell me when your application for these permits was filed?

A. All permits are, as a rule, stamped when they are filed. Of course, there is always one day or two days difference, as long as it takes from the cabinet where they are presented to come to the so-called register of entry papers, could be sometimes the same day, could be the day before.

Q. Would it be any more than, say, a week?

A. No; that would not be possible.

Q. What is the next operation after filing your application?

A. We should not have to do anything until we are [1007] informed that application is granted, and we have to pay the corresponding fee. As a matter of fact we generally send our employees to see that it goes from one—how should I say—from one department to the other in proper time; and then the next step is that we have to pay the corresponding fee and against the delivery of the receipt of the Central Bank that the fee has been paid the export license, the original of the export license, is given to us.

Q. And you paid this on June 11th, according to this exhibit; you paid the Central Bank the fee, which, in this instance, was 85.75 pesos?

A. Pesos.

(Testimony of Juan K. Lang.)

Q. Then what did you do with that receipt?

A. With that receipt we have to go to the Direccion de Exportacion to resolve the export license.

Mr. Bronson: You what?

The Witness: Receive the export license. Excuse me if I express myself sometimes wrong.

Q. (By Mr. L. B. Stanton): What do you do with the export license?

A. The export license we keep with us until we export the merchandise, and that license, then it has to be given to the custom house.

Q. I am showing you now, Mr. Lang, Plaintiff's Exhibit 64, being the Resumen Mensual de Exportacion. Do [1008] you recognize that?

A. Sure.

Q. I note in there on the head line—do you note the head line on this instrument?

A. Yes. It says "Glucosa."

Q. And below that do you find your firm name?

A. Yes. Those are the exporters of our firm, of Eugenio Lang S.R.L.

Q. You connect up those exports stated forth in there with the exhibit which has just been introduced, the export license?

A. These are exports made by our firm, and these are export licenses obtained by our firm. Exports can only be made with export licenses, and this would connect.

Q. Would you say that this exportation set forth in there was the one set forth in your export license.

(Testimony of Juan K. Lang.)

A. It could be. I cannot be completely sure. We have licenses and simply export against them.

Q. I will show you Exhibit No. 65—no; you were not on 65. Pardon me. I will show you Exhibit No. 66. Do you note your name there?

A. Yes.

Q. And that was for the exportations during the month of August? A. August. [1009]

Q. Do you know when you would have procured the export license for covering that exportation?

A. No. May I try to explain? We have licenses, we have licenses and we export. It is impossible for me to say whether against such licenses I exported in July or in August, but I suppose it was this, I mean.

Q. We can't have your suppositions, Mr. Lang.

A. I could not make it quite clearer.

Q. Do you know, Mr. Lang, whether or no there was an prohibition made by the secretary of industry and commerce prohibiting the exportation of glucose? A. Yes.

Q. You know? A. Yes.

Q. Do you know whether there was any such prohibition made in the month of May, 1946?

A. No.

Q. Was there any such order made later than May, 1946? A. Yes.

Q. When, if you know? A. In June.

Q. About what time in June, do you remember?

A. It was——

(Testimony of Juan K. Lang.)

Mr. Bronson: Well, I will object to the question. Excuse me a moment, sir. I will object to the question that it calls for hearsay, and I am merely following counsel's objections to the same evidence in the depositions that have already been in evidence from the South American witnesses.

Mr. L. B. Stanton: I can't hear you.

The Court: Read the question to me.

(Last part of record read by the reporter.)

The Court: All this testimony may be made the subject of a motion to strike. When all this evidence is in we can tell whether it is properly admissible or not. Overruled. Did you answer? You may answer the question.

A. 16th of June, our Government on that date proclaimed the campaign of 60 days to reduce the cost of living. In connection with this official campaign it was given a very great publicity. The export of all Argentine raw materials were prohibited for these 60 days. In connection with this the export of glucose, too, was prohibited—let me say, not the export—can I correct? The issuing of new export licenses for glucose was prohibited.

Q. (By Mr. L. B. Stanton): Counsel calls my attention to the reply there. Are you certain whether or not that was made in May or June?

A. I am quite certain it was made in June.

Q. Were licenses granted in May, to your knowledge? [1011]

A. Sure. You have seen them.

Q. Under this rule or order or whatever it was

(Testimony of Juan K. Lang.)

did that affect any case in which licenses had been granted before the 16th of June?

Mr. Bronson: Well, that would call for his conclusion, if your Honor please. We will object to it on that score.

The Court: I think that is beyond the scope of the examination of this witness. He has given us the facts as he knows them, but any interpretation of their effect is beyond the scope.

Q. (By Mr. L. B. Stanton): Do you know what the terms of this order were?

The Court: He has already told us that it forbade the issuance of further licenses.

Mr. L. B. Stanton: Well, I wanted to get the other matter, to find out whether it forbade——

The Court: Well, do not tell him what you want to find out.

The Witness: I can only answer you to my licenses.

The Court: What?

The Witness: As far as my own licenses were concerned which I held in my possession, it did not affect them at all. We continued to export.

The Court: Is there a question here before the witness at the moment? [1012]

Mr. Bronson: Your Honor, I think not. It is a volunteer statement.

The Court: No; there is a question. Let me ask you this question: At the time this order went into effect did you have any unexecuted licenses?

(Testimony of Juan K. Lang.)

The Witness: Yes.

The Court: All right. Did you after the date of the order or the 16th of June export under the license issued before that date?

The Witness: Absolutely.

The Court: Glucose?

The Witness: Absolutely, yes. The Argentine Government never goes back on licenses already granted.

The Court: Already out?

The Witness: Already out. That would be completely unfair.

The Court: All right. Anything else?

Q. (By Mr. L. B. Stanton): Do you know what the condition of the market in glucose was during the months of May and June?

A. Yes. I testified to that.

Q. And what was that condition?

Mr. Bronson: We are going to object to that. That is a new matter, if your Honor please, in this present examination. It is not rebuttal. [1013]

The Court: Yes. Let this witness be examined only in rebuttal and as to matters which were not covered by the depositions. In view of that understanding, I do not think this should be opened up.

Mr. L. B. Stanton: Very well, your Honor.

The Court: I think the statement I made gives adequate grounds.

Q. (By Mr. L. B. Stanton): Do you know the secretary of commerce, Mr. Lagomarsino?

(Testimony of Juan K. Lang.)

A. Ex-secretary.

Q. Ex-secretary? A. Yes.

Q. Did you have business dealings with him during 1946? A. Yes.

Q. Did you discuss with him the matters of exports and export licenses during that time?

A. Yes.

Mr. Bronson: Objected to as incompetent, irrelevant and immaterial, and hearsay.

Mr. L. B. Stanton: Well, we have the situation here of hearsay testimony that somebody went down to some place or other and found somebody that knew something or other about some sort of an order.

The Court: Read the last question, please.

Mr. Bronson: I was addressing my remarks to the court, incidentally, Mr. Stanton. I don't want an altercation with you.

The Court: Very well, read the question.

(Question read by the reporter.)

The Court: I do not see the materiality. I think the only testimony—of course, I am at a disadvantage, gentlemen, in not knowing the full extent of the depositions. But I ruled upon the questions relating to the oral character of these orders and held that if the order was oral, that then the hearsay rule does not apply. But I think this does not call for the existence of the order. The man is not a law expert and any conversations he had with the proper official would be the rankest hearsay and in-

(Testimony of Juan K. Lang.)

admissible for any purpose. I have already allowed him to testify as to the date of the order, to the nature of the order, and also that under the order he was allowed to export under licenses issued previous to the effective date of the order. I think that is as far as this man can go. To talk about conversations later on would not be material at all. I will sustain the objection.

Mr. L. B. Stanton: All right. Pardon me, your Honor. It probably was not later on.

The Court: What was that?

Mr. L. B. Stanton: It probably was not later on.

The Court: Or even at the time. It is not material what he said; it is what he did. If as a matter of fact the exporters were allowed to export despite this order, where they had outstanding licenses, then the interpretation of the order or any conversations become absolutely immaterial. The proof of the pudding is in the eating.

Mr. L. B. Stanton: We are offering this, your Honor, on this proposition: We are met with these three depositions, three men that say they went down to see somebody about something at some time and they were told there was such an order. Now, this is a conversation with the secretary of commerce and labor himself.

The Court: But better proof than the conversation is the fact this man has stated as a fact that he had the three licenses and that under them he was allowed to export; so that we are confronted

(Testimony of Juan K. Lang.)

with the same proposition as a contemporaneous interpretation by action, just as when you are dealing with a contract at times, that is the way people interpret it, by acting under it, and it is much more material than the language in the matter.

Mr. L. B. Stanton: But our contention is there never was any such order and we have to establish that by this witness.

Mr. Bronson: I hardly see how he can deny the existence of something he has already asserted. He said [1016] there was an order. He can't cross-examine his own witness.

Mr. L. B. Stanton: I am not going to cross-examine him at all, my witness. The point here is that these witnesses testified there was an order made on May 1st.

The Court: He has admitted that there was such an order.

Mr. L. B. Stanton: On June 16th.

The Court: He says there was such an order but that it did not apply to licenses which were issued prior to that time. I do not remember the exhibits, but it is my impression that you are claiming under a license issued prior to June 16th.

Mr. L. B. Stanton: May 27th.

The Court: What is that?

Mr. L. B. Stanton: May 27th.

The Court: May 27th. If this witness were available at the time——

Mr. L. B. Stanton: We are likewise faced with

(Testimony of Juan K. Lang.)

a situation that we have a deposition of Mr. Lagomarsino.

The Court: I will sustain the objection. I am saying this: There is no doubt in my mind as to this testimony. I am clearly convinced it is not admissible, but I will put it in. I will allow it to go in merely because of the situation that has arisen, and I will reserve a motion to [1017] strike. It cannot do any harm. I am not likely to be influenced by it, consciously or unconsciously, if I strike it later on.

Mr. L. B. Stanton: May the witness answer the question?

The Court: All right.

Mr. Bronson: What is the question?

(Record read by the reporter.)

Mr. Bronson: I would like to have the time, place, and persons present fixed.

The Court: Yes; let us have more of a foundation for the testimony. First, did you have a conversation about the license? You may answer that "yes," and if you do——

The Witness: Excuse me, but I must again repeat about the time period, if I had any conversation about what time?

The Court: About the time we are talking about. We are talking about the date of the issuance of the order.

A. About the date of the issuance of the order, no.

(Testimony of Juan K. Lang.)

The Court: Well, did you have a conversation afterwards?

The Witness: Afterwards, yes.

The Court: When was that? What date was that?

A. Sometime in August.

Q. (By Mr. L. B. Stanton): Who was present?

A. I saw Mr. Lagomarsino with a delegation of the [1018] chamber of exports.

Q. What, if anything, was said about the matter of the prohibition of exports or the prohibition of licenses?

Mr. Bronson: It strikes me now, your Honor, it is perfectly plain this would be completely after the fact, and his comments and opinions about it, and it is subject to the objection that it would be only conclusion, in addition to the other objections to the statement.

The Court: I am inclined to agree with you, but I am just allowing it to go in for the record because this witness will not be available at the time we close the evidence.

Mr. L. B. Stanton: I will say he will not be. He expects to be back in Buenos Aires on July 3rd, your Honor.

The Court: All right. You may answer.

A. We visited Mr. Lagomarsino, first of all, about all the problems of all the exporters of all Argentine commodities, and this matter was referred to the judgment of the President of the

(Testimony of Juan K. Lang.)

Republic, Mr. Peron; while the problem of glucose was referred to his personnel—how should I say—man in charge of that problem, Mr. Badini, with whom I later took up the questions of export of glucose.

Mr. Bronson: Export of what?

The Witness: Of glucose.

Q. (By Mr. L. B. Stanton): Well, what was said? [1019]

A. At the meeting with Lagomarsino?

Q. Yes.

A. We strongly protested against the prohibitions, that is all.

Q. What did Mr. Lagomarsino say, if anything?

A. Well, he regretted the situation created on the legitimate exporters and said that in all cases where it will be shown that no Argentine interests are violated, export will be admissible again, whilst in all other cases he referred to the judgment of the President of the Republic.

Q. Did you have any conversations with Mr. Lagomarsino before this meeting?

Mr. Bronson: It will be subject to the same objections, if your Honor please?

The Court: Yes. Yes, overruled.

A. I don't believe so.

Q. (By Mr. L. B. Stanton): Did you have any conversation before June of 1946?

A. It might have been. My duties often take me to the secretary of industry and commerce, but most

(Testimony of Juan K. Lang.)

certainly we did not discuss the situation of export prohibition because it did not arrive yet.

Q. Do you know when Senor Peron was elected President? A. In February, 1946. [1020]

Q. And when did he take office?

A. 4th of June, 1946.

Q. In May of 1946 what was the form of Government? A. What was that?

Q. The form of Government in Argentina?

A. It was called a de facto government.

Mr. Bronson: A what?

The Witness: A de facto government.

The Court: A de facto government.

Mr. Bronson: I understand.

The Court: That was Parral?

A. Yes; it was the government of Parral that came out of a military revolution the 4th of June, 1943.

Q. (By Mr. L. B. Stanton): Was it or was it not a fact that this de facto government complied with the laws in force?

Mr. Bronson: I will object, your Honor, as that calls for a conclusion and interpretation of law.

The Court: This man is not an authority.

Q. (By Mr. L. B. Stanton): Insofar as your affairs and business were concerned?

A. Yes, absolutely.

Mr. Bronson: We want to make the same objection. It comes a little late.

The Court: Yes, all right. I will reserve the objection.

(Testimony of Juan K. Lang.)

Q. (By Mr. L. B. Stanton): Do you know what the proportion of the export of glucose that your firm has with other exporters?

Mr. Bronson: Objected to as incompetent to any issue here.

Mr. L. B. Stanton: It just goes to the weight of his testimony, your Honor.

Mr. Bronson: He wants to know what percentage of the glucose business is done by Mr. Lang.

The Court: That does not prove anything. First of all, his character has not been attacked, so you can't bolster it up in advance.

Mr. L. B. Stanton: I am not bolstering it up. I just wanted to give the witness a standing before the court.

The Court: Standing does not mean anything. He is presumed to have standing until his character is attacked.

Mr. L. B. Stanton: It was not his character. The idea was his knowledge of the business, being one of the largest exporters.

The Court: The extent of the business is not material. It is the fact that he has relations which give him knowledge that is material.

Mr. L. B. Stanton: Cross-examine.

Mr. Bronson: When we conclude this I would like to [1022] have your Honor remind me to inform you what information I have been able to get about the date when those rogatory letters will be returned.

The Court: I will.

(Testimony of Juan K. Lang.)

Cross-Examination

By Mr. Bronson:

Q. I will call you "Mr. Lang," not using your formal salutation down there because it is simpler. You arrived here yesterday, I understand, is that true? A. Yes.

Q. You came up here specifically to testify in this case? A. No.

Q. Was that one of your purposes in coming to the United States? A. No.

Q. You gave your deposition, did you not, sometime past in this case? A. Yes.

Q. That is, you answered written interrogatories that were proposed to you? A. Yes.

Q. In looking at the exhibit that is marked 71, that is the group of licenses, they do not refer on the face of the license to the date the application was made; that is [1023] correct, is it not? You can look at them if you want. The clerk will hand them to you.

A. The stamp on the right, I believe on the right side, is the date that the application has been officially received there. That is the date.

Q. Will you point that out to me on the exhibit?

A. Sure.

Q. I am passing him Exhibits No. 71, 71-A, and 71-B. You are pointing to the stamp that is apparently a rubber stamp of date "28 May 1946"—right? A. Yes.

Q. Is that the date that the export licenses issued on?

(Testimony of Juan K. Lang.)

A. No. That is the date it has been applied for.

Q. The document itself with the head "Permiso de Exportacion," that means permit for exportation? A. Yes.

Q. That is the license that you have been referring to, is it not? Now, you are pointing in answer to my question.

A. No valid copy. That is not a license, but it is a copy.

Q. Let me ask you, then: This is a carbon copy of a document that is exactly the same as the original? A. Yes.

Q. Then refer to the original, if you want me to be [1024] that specific. That is, the original of this Permiso represents the license that you have been talking to? A. Yes.

Q. And the date of issuance of the license is this date at the bottom that you refer to, is it not?

A. No. That is the date when we apply for it, not the issuing.

Q. Is there a form called "application for a permit license"? A. That is the form.

Q. Is this the form?

A. This is the form. This form becomes a license when it has the proper stamps and signatures.

Q. Wait just a moment now. Will you produce that exhibit that is an application? If I may, I will look for it. Now I am showing you—and so I will identify it in the record, it bears the tag of the clerk of this Court, "Plaintiff's Exhibit 22" and

(Testimony of Juan K. Lang.)

it is headed "Solicitud de Permiso de Exportacion."
What is that?

A. That is apparently—how should I say—solicitud for the permit of exportation.

Q. It is an application, is it not?

A. Yes.

Q. For a license to export. Do you draw any distinction between that document I am referring to, Exhibit 22 for the plaintiff— [1025]

A. It is one of the copies.

Q. I understand that. Let us forget the distinction between the copies and the originals.

A. No, no, no, no. Excuse me. You got me all wrong. As far as I remember, those are a lot of forms, and I do not see on the forms on the head of our company. As far as I remember this is written all in carbon copies. One of the carbon copies is in white, one is in blue, one is in yellow, one of the carbon copies has a head that says "Solicitud," another carbon copy has a head that says "Permiso," and the third carbon copy that is yellow goes to the custom house.

Q. Then your statement is—and I see that there is a certain identity in the form of the rubrics on here—that the so-called application which I have referred to as Exhibit 22 is a document of which one of the carbons is headed with this "Permiso de Exportacion" and will be handled as the permit itself—right? A. Yes.

Q. Or license?

(Testimony of Juan K. Lang.)

A. It could also be that they used several forms.

Q. All right.

A. Because there are a lot of new forms used.

Q. Let us get this date business because that is what I am getting back to. [1026] A. Yes.

Q. You will notice on this Exhibit 22 which is the application that there is no date line corresponding to the position on the page of the permit form which is Exhibit 71. You notice that, do you not? A. Yes.

Q. You don't know, Mr. Lang, when that date May 28, 1946 is placed upon the carbon that is headed "Permiso" or license? Do you know?

A. It is within one day or two after it is presented. Here, it is not necessary here. It has the same date, see, only from the back side.

Q. It was May 27th on the back side of the document that is numbered Plaintiff's 22——

A. The only difference here——

Q. Just a minute. ——that we have been referring to as an application? A. Yes.

Q. All right. Now, what do they do with this copy that is called "Permiso," that is, the license itself; where does it stay during the time, that is, up until the time that the tax is paid?

A. It stays with the direccion de exportacion.

Q. It is not delivered to you? A. No.

Q. And it is retained there until what time?

A. Until you exhibit the proof of the payment.

Mr. Bronson: I am sorry. I did not quite understand.

(Testimony of Juan K. Lang.)

The Court: And it is not delivered to you until you exhibit the receipt for the payment of the tax?

The Witness: No; until you exhibit the proof of the payment.

The Court: And then it is delivered to you against this slip?

The Witness: Yes.

Q. (By Mr. Bronson): And that is the little slip which, in each case, you have attached?

A. Yes.

Q. A receipt stamp of the Banco Central?

A. Yes.

Q. I notice in the instance of these three permits or licenses, one of them—it is 71-B—is for 150,000 kilos?

A. Yes.

Q. That is the equivalent of 150 tons, is it not?

A. Yes; metric tons.

Q. Those are metric tons. That, according to the permit, has a destination of Switzerland—right?

A. Yes, sir.

Q. The other two were 50 tons and 25 tons, using that [1028] form rather than the kilos, and are for the United States—right?

A. Yes.

Q. Now, you told us a moment ago that you are the head of the company whose name you gave?

A. One of the partners.

Q. And that you did not keep a complete familiarity with the forms that are used. Did I understand that?

(Testimony of Juan K. Lang.)

A. Fairly; I have a great familiarity, may I say, with the forms that are used.

Q. Well, following these applications through the department, you say you send an employee over to see that they go from department to department within that secretariat for expediting the issuance of the license—correct? A. Yes.

Q. Do you know that that was done in this case?

A. Absolutely it is done in all our licenses.

Q. Done in all of them?

A. It is the normal procedure, normal office procedure.

Q. Let us get at it this way. You say you know it was done and you base that upon the fact that you have a routine in your office? A. Yes.

Q. But I am talking about your own knowledge as to when you made an application for these licenses and when they [1029] were issued. Well, let me point this out to you. Had you brought in the top copy, which is the application for the license, the reverse of it would have shown the date of the application, would it not?

A. I suppose so, but I cannot testify to that because there are several forms used and I cannot know exactly what form in this particular case my office used.

Q. The forms are printed and prepared by the secretariat of your government? A. Yes.

Q. You have them in your office but only by getting them from that source? A. Yes.

(Testimony of Juan K. Lang.)

Q. You said that you had great familiarity with these forms? A. Yes.

Q. Aren't you able to testify positively that the top copy, that is, the so-called *Solicitud* or application carries the date upon which it is made? I am asking you to look at this Exhibit 22 to help your memory on it.

A. Yes. And I am now replying to you. Our secretariat uses several forms because they had a big supply of old forms. Therefore we are using sometimes the older forms, sometimes the newer forms. I don't know exactly whether the older form that you have now, the blue one has [1030] date here which is applied to it with the machine. It can also be applied to it with a rubber stamp. I know that these rubber stamps are placed over there in the *Direccion de Exportacion* when they come in, and the date of the payment of the fee is the date that the license has been granted. It is the date we hear such a license is ready, pays the fee and withdraws the license.

Q. You will excuse me. I am afraid you are going a little beyond my question. I do not mean to interrupt you but we are in a hurry here. Let me ask you this: When was it that you were asked to bring up these documents that are now marked here Exhibits 71, 71-A, and 71-B?

A. The one I hold in my hand, when was I asked?

Q. Yes; when were you asked to bring this up here? A. I did not bring them.

(Testimony of Juan K. Lang.)

Q. You did not bring them? A. No.

Mr. L. B. Stanton: Is there any question?

Mr. Bronson: He had hesitated.

The Witness: No, no, no. I tried to remember the date. It was rather far away. I didn't bring them. Mr. Stanton brought them.

Q. Oh, Mr. Stanton brought them. When did he bring them?

A. Well, he must know that, not me. [1031]

Q. No, no. Did you see him down there in the Argentine? A. Of course.

Q. How long ago was it?

A. Well, it was last year. I suppose so.

Q. All right. It was at the time that these depositions were taken on written interrogatories, wasn't it? A. Yes.

Q. All right. Now, did he ever ask you for the copy of this document which is, according to you, the top one, and it is headed "Solicitud," application for permit license? Did he ever ask you to supply your copy of that? A. No, no.

Q. Has he at any time since then asked you to supply, so that we could observe the date that the application was made?

A. No; because this is the application.

Mr. Bronson: I did not get the answer, Mr. Reporter.

(Answer read by the reporter.)

Q. Yes; I understand it is the application, but

(Testimony of Juan K. Lang.)

the one I am showing you has to do with some business that you are not concerned with?

A. No.

Q. It was issued—it was applied for by Engraw, Compania Engraw. So you have never been asked—this is [1032] only to recapitulate—you have never been asked by anybody to present or to exhibit any document representing the application for the licenses represented by these Exhibits 71, 71-A, and 71-B?

A. This represents the application. I repeat to you we never made a separate application.

Q. I am not going to quarrel with you. I am just pointing out it is “Permiso” not application.

A. Yes; because this is only the third copy of that. There are two other copies of it and I don’t know whether on the other copies the printed forms say “Solicitud” or “Permiso.” I don’t know.

Q. Mr. Lang, only one other question on that subject. A. Sure.

Q. You have no independent knowledge of your own of the date that that application was put in?

A. Yes. I can tell it was within two days, a day or two days before the date stamped on that.

Q. That you base on the circumstances that you have an office routine? A. Yes, sir.

Q. That sees to it that they are rushed through very rapidly. All right.

A. I don’t go there personally. This I admit.

Q. I assumed you were not the office boy down there, [1033] Mr. Lang.

(Testimony of Juan K. Lang.)

The Court: All right.

Q. (By Mr. Bronson): Do I understand that you did not get the licenses in your hands until the date or after the date shown by the receipt for the tax?

A. We did not get it before. We did not have in our hands the receipt for the tax yet.

Q. Actually, the licenses are issued by the secretariat down there within 180 days or six months limit normally, are they not?

A. 180 days at that time.

Q. At that time. Had you any licenses in effect covering glucose issued prior to May 1st, 1946?

A. Yes.

Q. When were they used?

A. Always. We export glucose always.

Q. Do you wait as a matter of routine to get an actual order for goods before you ask for the license?

A. We have to. It is a law.

Q. You have to have an order, an actual destination before you apply, is that true?

A. You will see on the license that we have to give the exact f.o.b. value of merchandise in order to pay the fee. Obviously you can't give an f.o.b. value if you don't know your sales price. Therefore, licenses can only be issued [1034] when you have an order and can only be applied for when you have an order.

Q. Does the secretary require you to make some showing or voucher of that?

(Testimony of Juan K. Lang.)

A. Well, with firms of good standing generally not. Sometimes they do, and if they find something wrong, it is just too bad for the man.

Q. Well, let me get this: In your case you did not make any voucher showing the orders in the cases represented by these documents?

A. This I couldn't tell you. This is a question of office routine. If when applying for a license we are asked to show our vouchers, we show them.

Q. I want to call your attention to your deposition here. I think I can do it from here, and I ask that counsel follow me.

Mr. L. B. Stanton: I ask that he be permitted to see his deposition.

The Court: He may ask the question first.

Mr. Bronson: The depositions are in evidence. I am going to read one of his answers to the interrogatories.

Q. Now, shipments under these permits that are in evidence here, totaling—or, rather, specifically, 150,000 kilos to Switzerland; the other two, 50,000 and 25,000, to the United States, were made at some day after July 11th? [1035]

A. June 11th.

Q. June 11th, when you paid the tax. All right. Listen to the answer that you gave to the seventh cross-interrogatory, which was the Plaintiff's interrogatory No. 18.

Mr. L. B. Stanton: I ask that the witness be shown the document.

(Testimony of Juan K. Lang.)

Mr. Bronson: Well, it is better. I am just going from a photostatic copy. I will take that up, if it is agreeable. It has got the signatures and everything in the photostat.

The Court: All right.

Mr. Bronson:

“We made the following export shipments all for pure corn glucose testing from 43° to 45° Baume packed in wooden barrels: in May, 1946——

I will leave that out.

“in June, 1946, 54,776 kg to the U.S.A.”;

The Witness: 74,866 kilograms.

Mr. Bronson:

“to the U.S.A.; 74,866 kg to Switzerland”;

and then something to Palestine which I will leave out.

“in July 1946, nothing—in August 1946, 104,310 kg to the U.S.A.; 59,699 kg to Switzerland—in September 1946, 97,822 kg to the U.S.A.; 6,150 kg to Switzerland”;

omitting Palestine. [1036]

Without going further, you go ahead and cover your shipments of glucose clear down to April, 1947. What is your explanation for the differential between the tonnage that was covered on these exhibits and what I have read to you from your testimony last year?

(Testimony of Juan K. Lang.)

A. You mean why our——

Mr. L. B. Stanton: I do not believe there is any discrepancy, counsel.

Mr. Bronson: Just a minute.

The Court: He has a right to answer.

A. Why the quantities that we shipped apparently are discrepancies with the quantities of licenses?

Mr. Bronson: That is right.

A. We always hold export licenses for our different customers. Now, here are the total quantities. This is just one or two licenses. We didn't show, of course, all the information to Mr. Stanton, all our export licenses. There was no reason for that. He just asked for a few of them.

Q. When did you apply for your next export license after these in May, that is glucose, of course? You keep in mind I am only interested in glucose.

A. After May, the 28th of May, we applied, and after that I couldn't tell you now if we applied in June for something, but the next regular export licenses from newly [1037] sold merchandise—that means merchandise sold after June 16th—we only made late in August or in September, when, after several discussions with the committee of three gentlemen, Mr. Lagomarsino decided to make, first, one decree, and then another decree that authorized the export of glucose again.

(Testimony of Juan K. Lang.)

Q. Actually, that restriction was removed in September of 1946, was it not?

A. Yes; sometime early in September.

Q. There is one further question on that subject that I addressed to you last. I was roughly totaling up the shipments, beginning in May, to the United States, for instance. I will put it in tons because it is easier to carry. A. Sure.

Q. That would be just to drop off the last three zeros as they show in the answer I just read to you. In May 62 tons to United States; in June, 54 tons to the United States; in July, none; in September, 97 tons. Now, that would represent for those months up until the first of September 213 tons, of which 116 were in May and June and 97 were in September. Is it your testimony that some of that shipment during the months of June, July, and August of glucose to the United States was on permits received before May 1st, 1946? [1038]

Mr. L. B. Stanton: He didn't say that. I object to that.

Mr. Bronson: I am asking him.

Mr. L. B. Stanton: I object to that as misstating the record.

The Witness: Let us get it clear.

Mr. Bronson: The court will rule on it. The question is a simple one, whether any of your shipments in those three months were made on export licenses which were effective before May 1st, 1946.

A. Could have been, could not have been. I don't know.

(Testimony of Juan K. Lang.)

Q. You don't know?

A. The license is valid six months.

Q. When you gave the date of June 16, 1946, as the effective date of this verbal order, will you state the source of that information?

A. I would never give it as the date for the verbal order. I only said that on the date the campaign for 60 days officially started and every export prohibition went officially into effect only with the campaign of 60 days. Before that date there was officially and to our knowledge no export prohibitions of a general nature.

Q. Why do you qualify it that way, when you say "of a general nature"? [1039]

A. There are articles in Argentina that are always prohibited for export.

Q. I don't hear you.

A. There are certain articles in Argentina that are generally prohibited for export.

Q. Yes. But let us stay on glucose, if you do not mind. That is what this is all about. Let us keep out of conclusions now. You stated "of a general nature." You mean regarding glucose?

A. No, no; regarding all commodities. Regarding glucose this came only into force, in my opinion, on the 16th of June.

Mr. Bronson: I will ask that the last part, "in my opinion," go out, if your Honor please. He is expressing an opinion here, obviously.

The Court: Yes; that may be stricken.

(Testimony of Juan K. Lang.)

Q. (By Mr. Bronson): Now, was there any restriction on glucose to your knowledge effective before June 16, 1946?

A. To my knowledge?

Q. Yes. A. No.

Q. You mean you do not have any definite knowledge of it? A. I have no knowledge.

Q. I will ask you again where did you get your information about June 16th being the effective date? A. Out of the newspapers.

Q. Out of a newspaper? A. Sure.

Mr. Bronson: I will ask that that go out, if your Honor please. That is not evidence, I am sure.

Mr. L. B. Stanton: Pardon me. May it please the court——

Mr. Bronson: Let me ask him, before I resume the objection—let me withdraw it—if you don't mind, this way:

The Court: All right.

Q. (By Mr. Bronson): Have you got the newspaper with you? A. No.

Q. Did you make any search for the newspaper article? A. No.

Q. Before you came up here?

A. May I try to explain to you?

Q. Yes.

A. I want to explain just a little bit. The new government came into force on the 4th of June. The new government started something new on the 16th of June; so the display of it was unusual in

(Testimony of Juan K. Lang.)

Argentina, over all radio stations, over all newspapers, over everywhere the campaign of 60 days came into force. It was about the biggest thing that happened to Argentina in the last three or four years. So this was the official date for everything that was connected with export.

The Court: In other words, this fact was made public in various ways, is that it?

The Witness: Radios and newspapers.

The Court: All right.

Q. (By Mr. Bronson): Technically, how long before that had this order been in force, if at all?

A. I don't know about any order.

Q. By the way, before you came up, when did you leave the Argentine?

A. I left the Argentine on the 12th of February this year.

Q. You are acquainted with Mr. Lagomarsino or the gentleman to whom you referred?

A. I am.

Q. Did you discuss any of these subjects with him or make any effort to refresh your recollection with Mr. Lagomarsino before coming up here on the subjects which you have testified to?

A. I haven't seen Mr. Lagomarsino since August or September, 1946.

Q. Mr. Lang, you have got an interest in the outcome of this suit, have you not? [1042]

A. Indirectly, yes.

Q. And that arises out of a contract that was

(Testimony of Juan K. Lang.)

entered into settling and composing a matter that had been submitted to an arbitration of the Bolsa de Comercio in Buenos Aires, and it is your testimony that you did not seek out your friend, Mr. Lagomarsino, before coming up here?

A. I didn't say that he was my friend, too.

Q. Well, your acquaintance. Let us not split hairs. You did not seek him out on any subject of your inquiry before coming up here?

Mr. E. B. Stanton: We will stipulate he did not know he was coming into court when he came up.

Mr. Bronson: We don't know anything about it.

Mr. E. B. Stanton: Until you got those American depositions which set forth these facts set forth here, otherwise he could have brought some of these things that you holler about.

Mr. Bronson: All right; I think that concludes our cross-examination.

The Court: Any redirect? Just a minute.

Mr. E. B. Stanton: I have a couple of questions.

The Court: We do not allow switching of attorneys on the examination.

Mr. E. B. Stanton: Very well, thank you.

The Court: Your father may do it. But we do not do that ordinarily. [1043]

Mr. E. B. Stanton: That is all; no further questions.

The Court: All right, Mr. Lang, you may step down.

Mr. Bronson: After the recess on Friday of last week I sent a cable to the corresponding attorneys for the defendant in South America and received a cable since then stating:

“Your cable June fourth depositions not yet taken regret but believe rogatory letters will not be ready before sixty days we are rushing as much as possible.”

That is what we had asked them to do, to rush, and that is the response we received. I know your Honor is concerned about that and that is why I suggested it.

The Court: Yes. The main point is this: I can't keep this case open indefinitely. I have to continue it to some definite time for further proceedings and conclusions. That is the reason.

(Discussion of court and counsel as to duration of continuance omitted from transcript.)

The Court: I do not think it should take us more than a day to finish. The answers are here. I could read them. All that remains is to pass on any motions that may come up and hear the arguments.

We might do this, although, as I told you before, I prefer an oral argument. You were kind enough to furnish me [1044] with a transcript in this case. I am going to read all the depositions and I am not likely to forget it, with the aid of a transcript. We could submit this matter on the testimony in the record and the answers that may arise, the answers to interrogatories, and allow you to brief it and give

you a long enough time to take into consideration the possible delay. And if after I consider the matter I desire oral argument, I will call for oral argument, the matter to stand submitted as of not later than a certain date.

(Further discussion.)

The Court: If there is nothing before the court except the ruling on these motions, I could make a record so that we would not have to come down just for ruling on the motions.

Mr. Bronson: As I understood your Honor the other day, you expressed the desire to have oral arguments.

The Court: Yes.

Mr. Bronson: You still want them, I understand?

The Court: No. I am just trying to get around it by saying in view of the long delay it would be much better to have briefs, so that briefs could be presented. If I allow you the full two months, for instance, and I provide that the opening brief shall be filed, let us say, by the 9th of August, that gives you full 60 days, and give the plaintiff the right to open and give the plaintiff, say, until the 25th of August to file the opening brief, that gives you 14 days. That gives you two whole weeks. Or give the plaintiff 10 days, say until the 21st to file the opening brief, give you 10 days until the 31st of August, and then give the plaintiff 5 days to reply, or even if I give him 10 days to reply, that takes you to the 10th of September. That means that by

the time I get back here it will be not later than the 13th of September and the case will be ready.

Mr. L. B. Stanton: Your Honor, you are forgetting the fact that these depositions will probably not be back by the time.

(Further discussion.)

Mr. Bronson: May I make a suggestion, your Honor? Since the things Mr. Stanton is talking about are contingencies (No. 1) whether the thing is back in 60 days; (No. 2) whether he wants to rebut it by further depositions, can we make some order now such as your Honor suggested on briefs and then leave it for the further development of the happenings or contingencies to make any change?

Mr. L. B. Stanton: I would appreciate the matter if your Honor could put the hearing on oral argument, and then, as your Honor suggested some time since, if you wish for further information then we could put in briefs.

The Court: Of course, that would mean further delay. I will tell you what I will do. I don't like it, as a rule. Did you file any trial briefs here?

Mr. L. B. Stanton: There is a short trial brief.

The Court: Supposing we do it this way: Ordinarily I do not like simultaneous briefs because, as a rule, you are missing each other's answer which is very important. I remember I took one case under such a situation, took it over from the late Judge James after his death, and I found that it was so unsatisfactory that ultimately I had to

give them time to reply. So instead of having two briefs or at most three, I had five.

But in a case like this where the evidence is already in, it could be done by saying this: That we will set it for oral argument in September, say, either the 13th or the 20th. The 13th, of course, will be the first day I am back and probably will be a very busy day. Or I could even set it for the 20th and devote the entire afternoon to it. Briefs shall be filed, and if each of you has filed on or before that date briefs setting forth your views in the light of the testimony that is in the record, that is about the only way we can do it without giving a time limit. And then, of course, by the time you appear before me you will know what portion of the brief you want to answer. You do that in oral argument.

Mr. Bronson: Not if your Honor's order is "on or before." I am afraid we will get it "on" rather than "before." Let us get it in "before." [1047]

The Court: Well, before. And then if the brief of each calls for comment, you can file a supplemental brief, agree among yourselves, or file a supplemental *breach* so all of them reach me at that time. Then, you see, in that manner there will be no need for additional time. As it is, I do not need to submit the case, you see.

(Further discussion omitted from transcript.)

The Court: Supposing we do it that way and we will continue further proceedings to the 20th

of September, then oral argument at the time, and then I will hear any objection that you may have to any of the answers to the letters rogatory and renew your objection to this case, with the additional understanding that the case is to be argued at the time and that before that time there will be filed with the clerk by each side a brief setting forth their interpretation of the facts and the law of the case.

Mr. L. B. Stanton: How long before, your Honor?

The Court: Well, I was going to say "on or before." We will make it a week before or, put it this way: Before the 10th of September. That will mean that I shall have time to examine them before we have the oral argument.

Mr. L. B. Stanton: Lawyers are usually dilatory about putting things off to the last minute.

Mr. E. B. Stanton: Each side is briefing the case as they see it? [1048]

The Court: As you see it; yes. And, of course, you have a very good idea from some of the discussions that we have had what points the other side are relying on and what you are relying on.

Mr. E. B. Stanton: Assuming that these depositions come up and we wish to make application, your Honor, for the right to take further depositions by way of our rebuttal what would then be our procedure?

The Court: That is what I say, you will make your application at that time.

Mr. E. B. Stanton: That is September 20th?

The Court: That is right. But you can write your brief anyway. That is why I say I am merely continuing it for further proceedings, for further proceedings and oral argument, for further proceedings, oral or documentary, and receipt of depositions and oral argument.

We shall continue it for further proceedings to September 20th, with the understanding at that time any objections that are reserved may be made; that any objections to the interrogatories, assuming they have arrived, will be presented; and also, that on or before the 10th you will each file a brief. Supposing something arises and these depositions are not here, I am not foreclosing you.

However, I will say this, in justice to all parties: In taking into consideration my desire, I do not like to take [1049] this case for too long a time. I think we will have to leave it just as it is. If you desire to make any further application, unless counsel will stipulate—if he will stipulate, then you do not need to wait until that time. If you feel you want to take additional depositions, we ought not to lose time, otherwise the case will drag along to next year.

Mr. L. B. Stanton: I think counsel probably would stipulate. We have gotten along with counsel very well.

The Court: I think you did all right. Then that will be the understanding: The case continued for further proceedings until 10:00 o'clock

September 20th, with the understanding between court and counsel that I have already stated for the record.

The Clerk: Do you wish that at 10:00 o'clock a.m. or 2:00 p.m., your Honor?

The Court: We will have it 10:00 a.m.

(Whereupon a continuance in the above-entitled matter was taken until 10:00 o'clock a.m. of September 20, 1948, for further proceedings.) [1050]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of June, A.D., 1948.

/s/ ALBERT H. BARGION,

/s/ THOMAS B. GOODWILL,

Official Reporters.

[Endorsed]: No. 12261. United States Court of Appeals for the Ninth Circuit. Compania Engraw Commercial E. Industrial S. A., a Corporation, Appellant, vs. Schenley Distillers Corporation, Appellee, and Schenley Distillers Corporation, Appellant, vs. Compania Engraw Commercial E. Industrial S. A., a Corporation, Appellee. Transcript of Record. In Four Volumes, Vol. I. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 10, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12261

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A., a corporation,
Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,
Appellee.

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled Court, to Appellee, and to Messrs. Bronson, Bronson & McKinnon, Attorneys for Appellee:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdivision (a) of Rule 75 of the Federal Rules of Civil Procedure and Rule 19, Subdivision 6 of the Rules of the Ninth Circuit, appellant hereby designates the portions of the record which are material to the consideration of the appeal, as raised by the Concise Statement of Points, upon which appellant intends to rely, served and filed herewith, as follows:

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All that certain portion of the evidence in said cause contained in the Reporter's Transcript of Proceedings, and particularly designated by page and line as follows:

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All that certain portion of the evidence in said cause contained in the Reporter's Transcript of Proceedings, and particularly designated by page and line, as follows:

Exhibits

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Dated: This 15th day of June, 1949.

STANTON & STANTON,
By LOUIS B. STANTON,
Attorneys for Appellant.

(Affidavit of Service by Mail, attached.)

[Endorsed]: Filed June 17, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled Court, to Compania Engraw Comercial e Industrial S. A., a corporation, Appellant and Appellee, and to Messrs. Stanton & Stanton, its attorneys:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdivision (a) of Rule 75 of the Federal Rules of Civil Procedure and Rule 19, Subdivision 6 of the Rules of the Ninth Circuit, appellee and appellant hereby designates the portions of the record which are material to the consideration of the appeal, as raised by the Concise Statement of Points, upon which appellee and appellant intends to rely, served and filed herewith, as follows:

Pleadings and Proceedings

1. Original complaint.
2. Defendant's motion to dismiss and order denying same.
3. Amended complaint.
4. Defendant's motion to dismiss and order denying same.
5. Amendment to amended complaint.
6. Order permitting filing of amendment to amended complaint.
7. Answer to amended complaint.
8. Decision and Comment (opinion) of the Court.
9. Findings of fact and conclusions of law, together with the direction of the entry of judgment thereon.
10. Judgment.
11. Stipulation re transmittal of record and order re same.
12. Motion to amend findings under Rule 52-b.
13. Motion to alter and amend judgment under Rule 59-e.
14. Order denying motions under Rules 52-b and 59-e.
15. All notices of appeal with dates of filing.
16. Designation of contents of record made in District Court.
17. Order on transmittal of record.
18. Certificate of Clerk to record.

Evidence

1. All original exhibits filed in said action.

2. Entire Reporter's Transcripts of testimony taken on the trial of said action, including the depositions and exhibits transcribed therein.

Dated: June 17, 1949.

BRONSON, BRONSON &
McKINNON,

By EDGAR H. ROWE,

Attorneys for Schenley Distillers Corporation, Appellee and Appellant.

[Endorsed]: Filed June 17, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON THE APPEAL

Appellant Schenley Distillers Corporation intends to rely upon the following points on this appeal:

1. As a matter of law, no contract was created between the parties; and the Trial Court erred in finding (Finding 4) that a contract existed because, among other things, the evidence conclusively shows that:

(a) a contract would be created, if at all, only by formal purchase order;

(b) the existence of any contract was subject to the issuance and execution of a purchase order and the issuance of a covering letter of credit;

(c) there was never at any time a meeting of

the minds with respect to material elements of the alleged contract;

(d) there was no absolute, unequivocal acceptance by Schenley Distillers Corporation of any offer made by Compania Engraw Comercial & Industrial S. A.;

2. The evidence shows that Whipple was not, as alleged by Compania Engraw and as found by the Trial Court, the agent of Compania Engraw, but was in fact independent, without authority to represent, act for or bind Compania Engraw, and was dealing with Compania Engraw as a principal, and for his own benefit and account, and at his own risk.

3. The evidence shows that Compania Engraw could not have performed the alleged contract, and the Trial Court erred in finding (Findings 5 and 12) to the contrary; that even assuming the existence of the alleged contract, therefore, Compania Engraw failed to prove or establish any right to recover on the basis thereof.

This notice is given and statement made pursuant to the provisions of Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure and of Subdivision (6) of Rule 19 of the Rules of the above entitled Court.

Dated: June 17, 1949.

BRONSON, BRONSON &
McKINNON,

/s/ EDGAR H. ROWE,

Attorneys for Appellant, Schenley Distillers Corporation.

[Endorsed]: Filed June 17, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON THE APPEAL

1. The purchase contract, as found, was for delivery of 1135 tons of glucose on a definite shipping schedule of seven distinct delivery dates. By reason of the notice of repudiation, appellant was entitled to have damages determined as of the date of each of the respective delivery dates. The court accordingly erred in fixing the sole date for determination of damages as the date of the notice of repudiation, June 6, 1946.

2. The contract herein, among its terms, provided for the rate of exchange to be employed at 335.82 Argentine pesos to 100 American dollars. The court accordingly erred in fixing the rate of exchange at \$.206 or 4.85 pesos to the dollar.

3. The court erred in determining that there were two market prices, one for consumption and one for export; that such finding is contrary to the evidence, which was that there was only one market price.

4. The court erred in that portion of Finding 8, wherein it found in respect to the domestic and export market that "such prices bore no continuing or constant relations to each other," and that such finding is contrary to the evidence, as the entire evidence showed that the market price for glucose and the cost of delivery on board ship in the Harbor of Buenos Aires actually bore a continuing

and constant relationship to each other, in that the cost of said transfer was a continuing 15 centavos per kilogram in excess of the domestic market price, and that such cost involved the transfer of the goods, packaging, stevedoring, taxes and incidental expenses.

5. The court erred in making that portion of Finding 8, wherein it found "the established market price for such glucose for and during the whole of the month of June, 1946, for export f.o.b. steamship Buenos Aires, Argentina, was the sum of 1.35 pesos per kilo, which market price was 15c higher than the then domestic price of 1.20 Argentine pesos per kilo," and that the sole evidence produced in the case showed that the market price for glucose in Buenos Aires during the first part of the month of June, 1946, was 1.20 Argentine pesos per kilo, and that it cost 15 centavos per kilo to transfer said glucose in the Argentine market f.o.b. steamship Buenos Aires Harbor. The evidence further showed that in the latter part of June, 1946, the market price dropped to approximately 60c per kilo.

6. The court erred in its finding, in that portion of Paragraph 8, where it is found as follows:

"The established market price for such glucose during the whole month of September, 1946, for export f.o.b. Buenos Aires, Argentina, was the sum of 1.25 pesos per kilo, which market price was 15 centavos higher than the then domestic price of 1.10 Argentina pesos per kilo,"

in that said finding is contrary to the whole evidence, and that the evidence shows that the estab-

lished market price for glucose in the Argentine market during the month of September, 1946, was the sum of 60 centavos per kilo; that it cost 15 centavos per kilo to transfer said glucose to the Buenos Aires market to f.o.b. steamship in Buenos Aires Harbor.

7. The court erred in making that portion of Finding 8, where it is found as follows:

“The total market price for glucose of the same amount and quality, as specified in said contract for export f.o.b. steamship Argentina, on June 6, 1946, was the sum of 1,532,215 Argentine pesos,” in that said finding is contrary to the evidence and the law. The evidence establishes in this case that the market price for glucose during the latter part of the month of June was approximately 60 centavos per kilogram. The evidence establishes that the market price of the glucose in the respective months of delivery under the contract was at the rate of approximately 60 centavos per kilogram; that in fact, the market price for the various delivery dates was approximately 8,000,000 pesos.

8. The court erred in making that portion of Finding 7, wherein it found that:

“Defendant did not actively or continuously or otherwise negotiate with plaintiff during said period (between June 6, 1946, and September 18, 1946), or at any other time for the completion or restoration of said contract or deliveries thereunder; that at all times it maintained its claim that no contract existed between it and plaintiff and at all times

definitely refused to accept any deliveries under or pursuant to said contract,”

in that said finding is contrary to the sole evidence introduced in said cause.

9. The court further erred in its findings, in that portion of Finding 7, wherein it found as follows:

“At no time did defendant encourage, induce or otherwise cause or lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose,”

in that said portion of said finding is contrary to the sole evidence introduced in said cause.

10. That the court erred in failing to find the market prices on the contract delivery dates.

11. That the court erred in failing to find the market price on the date of final disposition of the glucose.

12. That the court erred in finding that the notice of repudiation of contract given on June 6, 1946, was or acted as an anticipatory breach of said contract; that the sole evidence and the facts and law produced establish that the anticipatory breach took place on September 20, 1946.

13. That the court erred in finding that portion of Finding 8, wherein it found as follows:

“Plaintiff has been damaged as a direct result of the repudiation of said contract by defendant in said sum of 28,375 Argentine pesos,”

in that the uncontradicted evidence and the law in said cause provided that, taking the market values of glucose as of the dates under which said

glucose ought to have been delivered, appellant suffered damage by reason of the breach of appellee in the sum of \$211,224.08.

14. The court failed to find on material issues set forth in the second cause of action and on the evidence produced thereunder that appellant was unable to dispose of the glucose until April of 1947; that the market price of said glucose during the month of April, 1947, was the sum of 52 centavos per kilogram; that the cost of transference on board ship Buenos Aires Harbor during said month was the sum of 15 centavos, which made a total price placed on board steamship of 67 centavos per kilogram; that thereby, appellant was damaged in the sum of \$238,225.97.

15. That the court erred in denying the motion of appellant under Section 52-b of the Federal Rules of Civil Procedure to amend the findings.

16. That the court erred in denying the motion of appellant under Section 59-e of the Federal Rules of Civil Procedure to amend the judgment.

This notice is given pursuant to the provisions of Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure and of Subdivision (6) of Rule 19 of the Rules of the above entitled Court.

Dated: This 14th day of June, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 17, 1949.